Who has a Right to Historic Wrecks and Wreckage?

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1 Introduction

In order to provide effective legal protection for the cultural heritage, it is necessary to know who has what rights to, or interests in, material of cultural value. The largest part of the underwater cultural heritage – wrecks and wreckage – is subject to some very special rules in this regard. This article will therefore examine the various proprietary and possessory interests which exist in wreck, along with some of the restrictions or limitations imposed on them.[1] These interests and restrictions have been established and developed in the UK by Admiralty and common law over many centuries and – since the nineteenth century – have to some extent been recognised and protected by statute. Most of the law has developed to deal with commercial interests, although an increasing focus is being placed on the interests of those concerned for the cultural heritage.

Interest in wreck law has grown along with the dramatic increases in technology that have enabled the discovery of ships long thought lost, such as the *Titanic*. In addition to the interest generated by sport divers, commercial recovery enterprises have flourished, particularly off the US coasts. As well as exotic Spanish treasure ships, there are hundreds of private merchant ships which were sunk during World Wars I and II of no commercial worth in themselves but with non-perishable cargoes of considerable value. Cargoes which are sought after include nickel, copper, aluminium, platinum, tin and lead. There are also more mundane cargoes which are proving attractive to commercial divers, including coal, jute and teak. Since some nineteenth and twentieth century vessels may be considered of historical importance,[2] it is clear that situations of conflict may emerge between those interested in the commercial value of the vessel's cargo, and those interested in the historical value of the vessel itself and its contents.

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1.1 Definitions of 'Wreck'

The term 'wreck' has many different meanings. In common parlance it tends to mean a vessel washed up on the coast, or a sunken vessel.[3] In legal commentaries it may refer to either *wreccum maris*, i. e. material washed ashore after shipwreck, or to *adventurae maris*, i. e. material still at sea; or to both.[4] There are also many statutory definitions. The term 'wreck' for the purposes of Part IX of the UK Merchant Shipping Act 1894, which deals with wreck and salvage, includes jetsam, flotsam, lagan[5] and derelict[6] found in or on the shores of the sea or any tidal water.[7] This definition is much wider than that at Admiralty law which defines wreck as property cast ashore within the ebb and flow of the tide after shipwreck, i. e. *wreccum maris*.[8] In fact, the Act seems to have been intended to include under one term prerogative rights pertaining to land, i. e. the right to *wreccum maris*,[9] and those constituting droits of admiralty, i. e. the right to *adventurae maris*.[10] The term also encompasses aircraft[11] and hovercraft.[12] By contrast, the New Zealand Shipping and Seamen Act 1952 defines 'wreck' to include: '[a]ny ship or aircraft which is abandoned, stranded or in distress at sea or in any river or lake or other inland water, or any equipments or cargo or other articles belonging to or separated from any such ship or aircraft which is lost at sea or in any river or lake or other inland water'.[13] As Davies points out,[14] this is a less restricted and complex definition than the corresponding UK provision. The US Abandoned Shipwreck Act of 1987 defines 'shipwreck' very simply as meaning 'a vessel or wreck, its cargo and other contents'.[15] This article will consider wreck in a similarly wide sense, so as to encompass all property cast ashore or remaining at sea after a marine casualty, including the hull of the vessel, together with its fixtures and fittings and the contents of the vessel, including cargo and personal possessions of passengers and crew.

1.2 International Law and Wrecks

Wrecks may be located in waters all over the world and any consideration of interests in them cannot fail to take account of their status in public and private international law.[16]

First of all, consideration should be given to the rights of any coastal state. So far as territorial waters are concerned, it seems to be accepted that the coastal state has the power to regulate activities connected with wreck within its waters. Thus, it can pass legislation restricting the extent to which persons may exercise rights over wrecks.[17] In the UK Protection of Wrecks Act 1973, for instance, the Secretary of State is given power to designate historic or dangerous wrecks of any nationality in UK waters and to prevent any kind of activity in relation to them. Even the owners of an historic wreck can be stopped from exercising their rights to dive

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on, or remove property. In the Protection of Military Remains Act 1986[18] similar powers are given to create war graves around military vessels. In one case it was stated that the Crown, as owner of the subsoil of territorial waters, would be able to remove a wreck which sank through negligence and caused an obstruction.[19]

States have also exercised residuary rights of ownership over unclaimed wreck found within their territorial waters[20] or, perhaps, brought within them.[21] Where a claim to ownership of a vessel is alleged, for example where there is an issue concerning abandonment,[22] the most generally accepted view is that the law to be applied is the law of the flag of the ship.[23] There are also issues relating to ownership of the cargo on the vessel, or the effects of the passengers and crew. The nationalities of these persons may be numerous, even supposing they can be traced.[24] In a case of doubt as to nationality, it is submitted that a court should apply the law of the flag of the carrying vessel rather than the law of the forum.[25] Arguably, the cargo has a closer connection with the vessel, from which there may also be practical difficulties in extricating it.

There may be cases where wooden ships have become so disintegrated that their contents might be said to form part of the subsoil. In *Elwes* v *Brigg Gas Company*[26] a 2,000 year old ship was buried on land close to a river. Chitty J. discussed whether the boat ought to be considered as a mineral, as part of the soil in which it was embedded,[27] or as a chattel. *O'Connell*[28] states that the boat was held to be a mineral. This is presumably a transcription error, as it was held, obiter only, that the boat was not a mineral. The judge seemed more inclined to hold that the boat remained a chattel, rather than becoming part of the soil, as it had preserved its original character. In any event, it was not necessary for him to decide the issue as the legal questions really concerned the interpretation of a lease. The better approach would be to consider wrecks and their contents as chattels wherever they are identifiable.[29]

The importance of the law of the flag seems to have been overlooked in many cases, such as those involving treasure found off the coasts of the US[30] and the assumption has often been that the only relevant law is that of the forum.[31] Where there are doubts as to the law of the flag, it would also be possible to consider the law of the salvor or finder.[32] This is perhaps less attractive, because of the possibility that treasure hunters could be seen to manipulate a court by 'flag shopping', i. e. by choosing vessels of a flag state with a convenient law of finding, or by reregistering there. There are also difficulties in assigning a single nationality to a salvor when there is a multi-national joint venture. On balance it would avoid conflicts if the main choice were between the law of the flag or that of the forum.[33]

There is more uncertainty concerning rights over wrecks situated outside territorial waters. There is no doubt that some states claimed to exercise sovereign rights over abandoned wrecks found on, or

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below, the high seas and brought back within territorial waters.[34] In so far as such a claim emphasises the ordinary rights of a coastal state to regulate property within its waters, it is unexceptional. It would seem to go beyond modern notions of territorial sovereignty[35] to allow such a state to claim rights while the property is still outside national waters.[36] There is no reason why one state should have a claim to ownership of abandoned property which has never had any connection with that state, for example, a foreign registered vessel. Should it have any residual rights in international law where the original owner cannot be traced, where there has been no abandonment,[37] but the owner was a national of the state or the ship was registered there? It would seem much more likely for courts in common law countries to apply the law of finding and not to recognise such remote state rights. The position would presumably be different if, in its national law, the state had enacted legislation giving itself rights over all unclaimed wreck that had formerly been owned by its nationals.[38]

A more recent phenomenon, in terms of the history of wreck law, has been the development of international law concerning the continental shelf, the contiguous zone, the deep seabed and the exclusive economic zone (EEZ).[39] The 1958 Geneva Convention on the Continental Shelf, Article 2(1),[40] allows coastal states to exercise sovereign rights on the continental shelf for the purpose of exploring it and 'exploiting its natural resources'. Article 2(4) of the Convention defines natural resources to include mineral and other non-living resources. It is probably correct to say that a wreck of a ship is not a natural resource,[41] although it is possible to see arguments that a cargo of ore, which may be all that is left of a wreck, is a valuable non-living resource. Gold bullion is a little more difficult to think of as natural, although gold is a base metal. However, in neither case can it really be said that they are the resources of the seabed, like manganese nodules, as they have been brought there artificially by man. Underwater cultural property can be said to be a resource in that it is a non-renewable source of archaeological and historical information,[42] but it is not a natural resource of the continental shelf and therefore is not within the definition. The point is important both because states may wish to regulate wreck hunting activities and because they might wish to claim abandoned wreck for themselves.

There are examples of states controlling the exploitation of antiquities on the continental shelf,[43] but it seems from the International Law Commission's explanatory comments on the draft 1958 Convention that it was 'clearly understood that the rights in question do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil'.[44] In hearings to consider the Abandoned Shipwreck Act of 1987, the US Department of State strongly objected to the assertion of federal title to shipwrecks on the outer continental shelf, beyond state

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boundaries, as this would be inconsistent with the 1958 Convention.[45] However, a state could pass legislation protecting the marine resources generally, or to create safety zones around oil platforms (as allowed by the Convention), which would enable it indirectly to restrict diving operations.[46] Similarly, it seems to be in order for a state to create war graves around its own sunken vessels on the seabed, at least so far as offences are only created for its own nationals.[47] It may be that customary international law would more easily support the notion that states might be able to legislate to preserve antiquities on the continental shelf than to enable them to assert title.[48]

The UN Convention on the Law of the Sea 1982 Part V created the concept of the 200 mile EEZ. Article 56 provides that the coastal state has sovereign rights over natural resources, as with the continental shelf, but also 'with regard to other activities for the economic exploitation and exploration of the zone'. Where a state has declared an exclusive economic zone, it could claim to exercise ownership over abandoned shipwrecks that are considered of commercial, rather than historical, significance. The argument would be that recovering a cargo of copper ore was an activity for economic exploitation. It might be thought that shipwrecks were not really within the purposes of the article, which itself gives instances of economic exploitation and exploration as 'the production of energy from the water, currents and winds'. Again, it is difficult to fit a shipwreck into this scheme, concerned as it is with resources which are of the zone and not brought into it.[49] The provision would certainly not seem to give rights in relation to wrecks which have only a historical significance, although many artefacts of historical value will also be of commercial value.[50]

Two other provisions of the 1982 Law of the Sea Convention should also be mentioned. First, Article 303 of the 1982 Convention recognises the rights of the coastal state to control removal of archaeological and historical objects (such as historic shipwrecks) from within its contiguous zone. However, Article 303(3) specifically preserves the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.[51] Secondly, the 1982 Convention created the Area, i. e. that part of the seabed under the high seas, outside other zones. Activities in the Area were stated in Article 140 to be for the benefit of mankind as a whole. Article 149 provides that all objects of an historical and archaeological nature found in the Area should be so treated, 'particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of archaeological and historical origin'.[52] Given the political controversy about the establishment of an International Seabed Authority, the practical effects of Article 149 may be limited for some time. The important point is that the international community is coming to realise that the subject of wrecks is not one that can

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only be considered from the point of view of traditional maritime law, with its emphasis on commercial rights. International rules will increasingly recognise the public rights of states over wreck, but clearly identifiable private rights should still be respected, unless abandoned.[53]

1.3 The Receiver of Wreck Service

In the UK the main body of statute law relating to wreck is now found in Part IX of the Merchant Shipping Act 1894,[54] although other provisions are scattered around the statute book. Much of the statutory material is in need of revision and consolidation, as it has failed to keep pace with developments in law and modern diving practice. Moreover, provisions designed to prevent nineteenth century plunderers are not really appropriate to the preservation of archaeological remains.

The 1894 statutory provisions, which establish a receiver of wreck service to administer the handling and disposal of wreck,[55] were framed at a time when the majority of vessels were still propelled by sail and there were only minimal aids to navigation. Casualties to ships on the coast were far more numerous than they are today and the 1894 provisions were passed to deal in particular with a pressing problem of the time: namely, the traditional plunder of distressed vessels by coastal communities. The provisions were therefore primarily concerned with the safe-keeping and disposal of property from vessels in distress or recently wrecked and not from vessels which had been lying on the seabed for a considerable period of time, possibly for centuries.

Until 1 January 1993, receivers were mainly officers of HM Customs and Excise, distributed on a district basis around the coast of the UK. Since 1 January 1993, with the reorganisation of the Customs Service owing to the creation of the Single European Market, the network of receivers was replaced by a single appointment in the Department of Transport's Marine Directorate and the receivership duties are now operated centrally.

Under the Merchant Shipping Act 1894, where any person finds or takes possession of wreck within the limits of the UK, he must: –

> '(a) If he is the owner thereof, give notice to the receiver of the district stating that he has found or taken possession of the same, and describing the marks by which the same may be recognised; (b) If he is not the owner thereof, as soon as possible deliver the same to the receiver of the district.'[56]

This provision has been extended to cover wreck found or taken possession of outside the limits of the UK and brought within such limits.[57] The requirement for reporting of wreck is designed to

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prevent an improper detention of the property and to enable the receiver to establish legal entitlement to the wreck.

The receiver must advertise wreck that has been brought ashore in the UK in order to inform potential claimants of the find, including the original owner or someone with a right deriving from the original owner.[58] If the wreck is of value, the receiver must notify the Secretary at Lloyd's in case an insurer wishes to exercise rights of ownership.[59] The owner of any wreck in the possession of the receiver must establish its claim to the wreck within a period of one year from the time when the wreck first came into the receiver's possession.[60] The owner must 'establish his claim to the satisfaction of the receiver', although this may not necessarily be easy and the owner must also pay any salvage or expenses due in respect of the wreck. If no claim to the wreck is established within the one year period, the wreck will be treated as unclaimed and title may well vest in the Crown.[61] In the case of unclaimed wreck, the Act provides that the receiver shall sell the wreck and (after deducting fees,[62] expenses, and such amount of salvage as the Secretary of State may determine) pay the proceeds for the benefit of the Crown. Thus, the discoverer of a wreck brought within the UK knows that it will always be entitled to a salvage reward. Ultimately, the calculation of that reward will be a matter for the court. In practice, as far as unclaimed 'historic' wreck is concerned, the salvor will usually receive 100% of the net proceeds of any sale, less receivers' expenses, or the wreck will be returned to the salvor in lieu of salvage with a charge being made for any expenses incurred.[63]

The system for reporting and disposal of wreck laid out in the 1894 Act has in fact largely fallen into disuse. In 1989 there were 18 reports of finds made to the receiver service; in 1990, 25. Of the 25 items of wreck reported in 1990, 21 had no value and were disposed of immediately by the receiver.[64] The four other cases involved a small pleasure craft broken free from its moorings, a marine engine, a coil of rope and one item from an historic wreck. In 1991 there were approximately ten reports of wreck. Although the receiver of wreck service covers modern wreck, in practice its services in this respect are rarely called upon. Corporate ownership of modern ships, organised salvage facilities and the existence of the Coastguard able to co-ordinate search-and-rescue activities have largely removed the need for receivers of wreck where there are recent casualties.[65] As far as 'historic' wreck is concerned, it is clear that the 1894 system is as much honoured in the breach as it is in the observance. Recoveries from wreck sites designated and licensed under the Protection of Wrecks Act 1973[66] are reported on an annual basis and are not included in the figures given above. However, there are thousands of other wrecks – of various ages – around the shores of the UK and, with a conservative estimate of 70,000 British sport divers, it is clear that only a very small proportion of recoveries

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are being reported. The recent centralisation of the receivership within the Department of Transport appears to represent a deliberate winding down of the service.

2 Proprietary Interests

A variety of persons might acquire ownership rights over a wreck, but the most difficult issue is often to decide when, if at all, they may have abandoned their rights.[67] The rights of insurers present particular problems and will be considered separately.[68]

2.1 Ownership

2.1.1 Methods of acquiring ownership

As with all other forms of property, there are many ways of acquiring ownership of wreck. The obvious means is through succession, either personally, for example a descendant of a passenger on board a Dutch East Indiaman has claimed their personal possessions; or corporately, for example the Dutch Ministry of Finance is heir to the Dutch East India Company.[69] The purchase of ownership rights is another obvious method, an interesting example being that of a vessel which lies in the mud flats of the River Hamble in Hampshire. She is believed to be the *Grace Dieu*, the biggest ship ever built in England at the time of her construction in 1416,[70] although her identity has not been proved beyond doubt. If she is the *Grace Dieu*, then she would have been one of the most important vessels in Henry V's navy and therefore a Crown vessel. If this is the case, ownership may have remained with the Crown. In the light of this possibility, in 1970 the Ministry of Defence (MOD), acting on behalf of the Crown, transferred all such right, title or interest as the Crown may have had in the wreck to the University of Southampton, acting on behalf of the Society for Nautical Research, for the nominal sum of £5.[71] Other methods of acquisition are through subrogation, for example the *Lutine*;[72] and through donation, for example the Tudor warship *Mary Rose*[73] was donated by the MOD to the Mary Rose Trust.[74] Salvors may acquire property in lieu of a salvage award, or in some jurisdictions through the law of finding.[75] The Crown obtains ownership rights to unclaimed wreck[76] and states may acquire property through confiscatory provisions, for example all German property in Norway as at 9 May 1945 was taken over by the Norwegian government, including wrecked German warships and merchant ships off the Norwegian coast.[77] Another, more theoretical, method of acquisition might be through accretion. A number of ancient wrecks have been found on land which was once part of the seabed or a river floor.[78]

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2.1.2 Establishing owner's identity

Prima facie, the strongest interest in wreck is the proprietary right of the owner, however that right may have been acquired. In order to establish an ownership claim, it is necessary, first, to discover the identity of the original owner (and possibly a chain of successors in title) and, secondly, to establish that the ownership rights have not in some way been lost. Claims to vessels and their contents which were wrecked since the middle of the nineteenth century are likely to be made quite frequently and established with greater ease than claims to earlier wrecks. There are two reasons for this. First, a great part of this period is within living memory and, secondly, the Salvage Association[79] maintains records dating back to 1860 of vessels lost and claims made. When a potential salvor expresses an interest in salving a wreck, the Salvage Association will endeavour to discover the existence of any commercial (particularly insurance) interests. For example, many vessels lost during the two World Wars may have been insured or reinsured for war risks by the government. There is an office in the DTp which liaises with the Salvage Association and the war risks insurers and handles inquiries about the sale of government-owned wrecks and cargoes.[80] There are thirty volumes of World War I 'Shipping Losses' and detailed files containing information about World War II settlements.[81]

It is not impossible under UK law for the lawful successors of an original owner to claim their property centuries later and the hulls of several historic wrecks in UK territorial waters have been claimed by foreign governments. For example, the ownership of the Dutch East Indiamen, the *Geldermalsen*,[82] the *Amsterdam*[83] and the *de Leifde*[84] has been legally established by the Dutch Ministry of Finance, as heir to the Dutch East India Company.[85] In theory, the same principle applies to the cargo and personal possessions on board a wreck, but in practice the original owners of such items can rarely be identified so there are far fewer claims by modern descendants to this property. This distinction between the hull of a vessel, and the cargo and personal possessions on board is illustrated by the case of the passenger liner *Lusitania*. In 1982 items of general cargo and personal property were raised from this liner which had been torpedoed by the German Navy in 1915. She had sunk 12 miles off the Irish coast and outside British or Irish territorial waters. Nonetheless, the items raised were brought ashore in the UK. Ownership of the vessel herself, and her fixtures and fittings, was not disputed.[86] The cargo and personal possessions were a different matter owing to the number of interests involved and the difficulty of proving ownership. For these reasons, following the one year claim period provided by the Merchant Shipping Act 1894, these items remained unclaimed by the original owners or their successors.[87] If such difficulties are found in establishing ownership of property lost in 1915, clearly the position with respect to earlier

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wreck must be even more uncertain. However, claims to such wreck are known, for example that of Baron Bentinck of Gorssel, descendant of a passenger on board the Dutch East Indiaman *Hollandia* which sank in 1743, who declared his interest in a copper-gilt shoe buckle and silver cutlery bearing his family arms.[88]

2.1.3 Government ownership

Governments, like any other body or individual, acquire property rights in a variety of ways, for example through 'inheritance', subrogation of rights through reinsurance, and confiscatory provisions. As far as 'inheritance' is concerned, in the UK the MOD exercises – on behalf of the Crown – rights of title over all British warships and other ships on non-commercial service wherever they lie until such time as a public announcement is made.[89] A number of important historic wrecks are included in this category, for example the *Mary Rose*. Before the *Mary Rose* rescue project began in 1979, the MOD regularly and readily sold its rights to historic wrecks to anyone who applied.[90] In general, even today, the policy is much the same. The decision on whether or not a wreck is sold or licensed is made on a case-by-case basis, depending on the value of the wreck or its cargo, both financially and historically, and on the motives of the intending purchaser. If the wreck or cargo are to be sold for financial gain, the MOD will charge a flat fee plus a percentage of the proceeds. If the purchaser's interest is historical or archaeological only, then the MOD will charge a flat fee. In the case of the *Mary Rose* and one or two other important historic vessels, the MOD has been persuaded to give the vessel by Deed of Transfer to a reputable archaeological group to hold on trust for the general public. The English warship *Anne*, which sank in 1690 off East Sussex is one such vessel. The Deed of Transfer, dated 10 June 1983, transferred to a charitable trust called the Nautical Museums Trust Ltd. every part of the vessel and all that had since 1974 been raised from her and all that was situated in her immediate vicinity (save personal effects not belonging to the Crown). The transfer took place 'upon trust to raise in whole or in part (so far as the Trust may in its absolute discretion determine) to preserve and to display same for all time in a museum or museums for the education and benefit of the public'. Material subject to the trust may only be disposed of with the consent of the Secretary of State, although the Trust is given power to make loans of such items for any period not exceeding five years.[91]

The government also has interests in about 5,000 vessels lost during the two World Wars, mainly through paying out on war risk insurance. Except where there has been loss of life, these wrecks are available for sale from the DTp. Such purchase entitles the owner to dive on the wreck, but it may be a term of the contract of sale that the cargo must be left undisturbed.[92]

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Some East Indiamen are reputed to have great value, such as the wreck of the *Grosvenor*, lost off South Africa in 1782.[93] The Government of India Act 1858 section 39 (since repealed) vested in the Crown the 'monies, stores, goods, chattels and other...personal estate' of the East India Company 'to be applied and disposed of...for the purposes of the government of India'. Section 40 gave the Secretary of State in Council power to dispose of the property. The precise effect of the wording has given rise to some doubt, as it is unclear whether it applied to all the Company's wrecks, or only to those in UK waters. Further, the Crown almost seems to have been impressed with a statutory trust, as the proceeds of any finds would have to be used for the benefit of India. Following the Indian Independence Act 1947 the property rights and interests of the former colony were divided between India and Pakistan. It appears that the governments of India and Pakistan – amongst others – dispute British title. So far, the Foreign and Commonwealth Office (FCO) has been reluctant to claim property in the Company's wrecks, partly, perhaps, in order to avoid international friction. Nevertheless, it seems to be the government view that some property in the UK did remain with the Crown after independence, such as the India Office Library, and that wreck rights, if they exist, would probably be subject to the administrative control of a relevant Department such as Environment, or National Heritage.

Difficulties are more likely to arise where the vessel is located in the territorial waters of a coastal state, which may assert that the wreck has been abandoned. Certainly, it appears that the MOD would claim ownership of all sunken British warships anywhere in the world unless they had been disposed of by the MOD's Director of Sales (Disposals). The Secretary of State would hope for the co-operation of foreign governments in respect of wrecks lying in their territorial waters and in return would provide protection for the wrecks of foreign naval ships lying in UK waters. However, there is a British ship, sunk in Bombay during World War II with lend-lease gold, part of which was British, part American. The government wanted to arrange for salvage operations in which the gold was returned to its original owners, but the Indian authorities are apparently claiming an interest.

The US too faced difficulties when it attempted to assert title to the CSS *Alabama*, a Confederate raider, which sank seven miles off the Normandy coast in 1864 and was discovered in 1984. The US government based its claim to the ship on two grounds. First, by right of capture because the captain of the *Alabama* had surrendered his vessel to the USS *Kearsage*, which then took constructive possession of the *Alabama* before she sank.[94] Secondly, by virtue of the fact that the US is successor to all the rights and property of the Confederate government.[95] The French government initially questioned the US government's assertion of ownership, claiming that the vessel and its contents were French property because they

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were located in French territorial waters.[96] In 1989, the French government conceded that the US had title to the vessel and its contents.[97]

In 1986 the stern section of the British warship HMS *Birkenhead* was the subject of salvage operations in the territorial waters of South Africa. The *Birkenhead* was carrying troops when she sank in 1852 and there was speculation that she had on board a large number of gold sovereigns for the purpose of paying the troops.[98] The vessel is of special historical and sentimental value to the British because of the action of the soldiers in standing to attention on the sinking vessel to allow all the women and children on board to be saved in the lifeboats.[99]

In 1983 the South African National Monuments Council issued a permit to a salvage syndicate and at the same time declared the *Birkenhead* a national monument.[100] It was the syndicate who found the missing stern section in 1984. Its discovery led to an exchange of correspondence between the British and South African governments disputing ownership of the wreck. Both were clearly interested in the gold reputedly on board, but the British government was also concerned to ensure that any human remains were left undisturbed. Despite some newspaper reports that the Admiralty had sold the hull by public auction soon after the disaster, the British government claimed ownership of the wreck on the ground that it was the practice of the UK to maintain its rights and interest in British warships wherever they may lie until such time as abandonment is announced by the British government. The South African government, on the other hand, refused to recognise the British assertion, claiming that there were no international conventions or agreements – to which South Africa was a party – which provided for the claims of foreign states to wrecks in other states' territorial waters. The South African government therefore itself claimed ownership of the wreck. It also claimed that the MOD could neither authorise nor deny salvage rights on South African National Monuments, nor could it restrict diving in South African waters. The dispute was resolved by an exchange of notes in 1989.[101] The terms of the agreement resulting from the exchange of notes included that the South African government should seek to ensure that the salvors treat with respect, human remains discovered at the site and that the gold (after deduction of salvage) would be shared equally between the British and South African governments. A number of gold sovereigns were found during the 1986 salvage attempts, but the operations were hampered by bad weather and dangerous conditions and, by the time of the agreement in 1989, had been suspended.

The Netherlands and Australia have also reached an agreement regarding the wrecks of Dutch East Indiamen off the coast of Australia. Under the agreement the Netherlands has transferred to Australia '...all its right, title and interest in and to wrecked vessels of the VOC lying on or off the coast of the State of Western

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Australia...' in return for Australia recognising that the Netherlands has an interest in articles recovered from these vessels.[102]

As well as claiming ownership of Dutch East Indiamen, the Dutch have also claimed ownership of the *Lutine* (whose bell now hangs at Lloyd's). She was a 32-gun frigate which had originally belonged to the French, but had been captured by the English and claimed as a prize of war. While sailing under the English flag with specie valued at £1 million, she was wrecked off the Netherlands in 1799 and again claimed as a prize, this time by the Dutch. The specie was insured at Lloyd's, which paid out in full on the claim. The conflict which arose between Lloyd's and the Dutch government as to who was the rightful owner of the specie was resolved in 1857 when they came to an arrangement whereby Lloyd's received half of the amount recovered.[103]

In contrast to the Dutch, the Spanish have been more reserved about stating their claims to ancient wrecks of Spanish origin. In the case of the Armada galleon *Girona*, which was discovered in 1967 off the Northern Irish coast, the vessel had been engaged at war with the British when it sank and was therefore considered a prize. For this reason, the Spanish did not make a claim. In May 1985, another vessel thought to be part of the Spanish Armada was found, this time off the coast of the Republic of Ireland.[104] Although rights to material brought ashore have still to be settled, it appears that the Spanish, although again showing an interest, did not make a claim. In the case of Spanish vessels found off the US coast, for example the *Nuestra Señora de Atocha* and other galleons wrecked off Florida, the Spanish government have also made no claim: instead the US federal government, states and salvors fought for rights to the wrecks.[105]

Some states become owners of wreck by virtue of legislation that gives them confiscatory or residuary powers. In most cases that legislation will have been enacted for the purpose of protecting historically important wrecks. For example, in Spain a statute dated 24 December 1962,[106] provides that the State of Spain acquires ownership of any vessel which is sunk, salved or found when its owner does not exercise his or her right within three years of the vessel sinking. The Abandoned Wreck Law of the Cayman Islands provides that wreck which has 'remained continuously upon the sea bed within the limits of the islands for a period of 50 years and upwards before being brought to shore' belongs to the state.[107] The legislation establishes two useful presumptions: –

> 'All wreck found in the possession of any person within the islands shall be deemed to be abandoned wreck until the contrary is proved to the satisfaction of a Magistrate or the Commissioner of Wreck and any person found in possession of abandoned wreck shall be presumed to have brought it ashore

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unless he has some satisfactory explanation of the manner in which it came into his possession.'[108]

In Finland a 1963 Act on historic relics provides that the state has title to all movable property on board wrecks over 100 years old.[109] The Danish Law Concerning the Protection of Historic Wreckage dated 31 May 1963 provides for state ownership of wrecks over 150 years old where no owner can be found.[110] The US Abandoned Shipwreck Act of 1987 vests title in the federal government to any abandoned shipwreck found in or on public lands of the US, e.g. underwater national parks. It also asserts US title to certain classes of abandoned shipwrecks in state waters and transfers such title to the states within whose waters they lie.[111] Such confiscatory measures may cause legal problems. For example, they may conflict with constitutional protections against interference with rights of private property and there may also be a problem where a state tries to divest a foreigner of ownership.[112]

2.1.4 Personal possessions and human remains

When a vessel sinks, there is often great loss of life. It will follow that the estates of the deceased will be entitled to exercise rights of ownership over their personal possessions. Human remains can exceptionally be found several hundred years after a sinking, depending on the site of a wreck, for example human remains are present on the seventeenth century warship recently discovered off the coast of Scotland.[113] Relatives are naturally sensitive about the remains of their loved ones and may often be alarmed at salvage operations which might be destructive. It does not appear that the relatives or the personal representatives have clearly recognised rights at common law to require that a wreck and its human contents be raised, or to restrict or prohibit salvage operations and the question of the existence of rights over the bodies themselves presents even more difficult problems. A deliberate burial at sea is probably regulated, in the UK, by the Food and Environment Protection Act 1985 Part II,[114] but it is doubtful if the Act can apply to a declaration by a relative that a body in a wreck shall be treated as 'buried' at sea.

It is often said that the law recognises no property in a dead body.[115] However, this assumption has been questioned, both in law and principle,[116] although not in the context of wreck law. If there is property in human remains a number of consequences would follow. First, a finder (or, possibly, a landowner in whose soil the body is affixed)[117] could become the effective owner of an abandoned unidentifiable body[118] and would be able to sell the remains. Secondly, it would be assumed that the personal representatives of the deceased would normally become the owners and entitled to bring actions for trespass, claiming an injunction to stop diving

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operations which interfered with the body[119] and, perhaps, damages for emotional stress.[120] Indeed, it is arguable that in relation to a recent death the personal representatives would already be entitled to the right to possess a body with a view to burial.[121] It is submitted that the personal representatives should have a right of action to prevent an unreasonable interference with bodies by salvors, but there would be formidable problems (i) over identification, (ii) where some personal representatives consented to diving operations, (iii) where any intereference by salvors would be incidental to the removal of cargo. A court could refuse an injunction, and give nominal damages, where the salvage operations were to be conducted carefully and with respect. It would certainly be more satisfactory for the matter to be dealt with by legislation.

It is often said that a ship sunk in war time is a war grave.[122] Before 1986 such statements had to be treated with great caution, as it does not appear that they had any precise legal basis and government departments may have used the expression to deter unwanted diving activities. In theory, there is no reason why an owner of a wreck, such as the Crown in respect of a warship, could not exercise its proprietary rights to forbid salvage operations, although there are difficult questions concerning the possessory rights of a salvor.[123] The MOD regularly receives and refuses requests to dive on the remains of HMS *Repulse* and HMS *Prince of Wales*, which were sunk in 1941 off the coast of what was then Malaya and rest in comparatively accessible waters. Navy divers periodically replace White Ensigns attached by rigid steel wires to the propeller shafts of each vessel,[124] indicating not only respect for the 840 men lost, but also a manifest intention to retain rights – both of possession and ownership.

It was and still is UK government practice only to sell wrecks, or arrange salvage contracts, where there will be no interference with remains or where strict diving conditions are set out. A major controversy was caused during the 1982 salvage of HMS *Edinburgh*, which sank in 1942, when divers reportedly showed a lack of respect for remains, for example by putting chemical lights in skulls to startle other divers.[125] Partly in response to the uproar from veterans' associations, the Protection of Military Remains Act 1986 was passed. In essence, the Act allows the Secretary of State to designate vessels and aircraft wrecked while engaged on military service on or after 4 August 1914 (the outbreak of World War I). There is also power to designate sites of a sinking or stranding, if less than 200 years has elapsed.[126] Various offences may be committed, such as tampering with remains. Although the Act extends to international waters, offences can only be committed by British citizens, or on board British controlled ships.[127] Although the drafting of the Act is convoluted, its aim is clearly to create war graves and is consistent with international law. It does not apply to merchant vessels, however, unless under section 9(2) they are being used 'for the purposes

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of the armed forces'. This definition would seem to include troop-carrying vessels and naval auxiliaries, but may cause difficulties when deciding whether it extends to vessels on charter to the government to carry food. It is submitted that a broad interpretation should be applied, so as to include commercial ships carrying produce that may have been used by the armed forces as opposed to civilians. The government may have been reluctant to see the Act extended to merchant ships because of the interference with commercial interests, but it is difficult to see why some human remains are entitled to more respect than others.[128] The existence of a common law action, as outlined above, would assist, but it would be better to extend the coverage of the 1986 Act.

2.2 Abandonment of Rights

Once the identity of the original owner is established, the next question that must be asked is: has the owner abandoned its ownership rights? The ordinary, plain meaning of the word 'abandonment' is to give up control or possession of, in this case, a vessel, epitomised by the cry 'Abandon ship!' In giving this order, the master usually intends simply to abandon possession in the face of imminent peril, rather than to abandon the ownership rights in the vessel. The legal term 'derelict' used in salvage law[129] is usually taken to mean that the vessel has been abandoned at sea by the master and crew, without intention of returning to her (*sine animo revertendi*) or hope of recovery (*sine spe recuperandi*). It does not necessarily involve the loss of the owner's property in the vessel.[130] It is now regarded as axiomatic that title to a vessel and its contents remains intact if the crew has been compelled to abandon the vessel, or has died as a result of a shipwreck.[131] The fact that a vessel is a legal derelict does not necessarily make her *res nullius*, i. e. ownerless.[132] It is clear that physical abandonment alone is not enough for the owner to lose its property rights in the vessel and there must be some form of positive intention, or *animus derelinquendi*, on its part to relinquish rights of ownership.[133]

There seems to be no legal reason why persons cannot voluntarily divest themselves of their rights in wreck,[134] as opposed to their liabilities, but there seems to be little advantage to be gained by so doing. According to Goode,[135] the 'holder of an indefeasible title cannot shuffle it off by abandonment, as the law does not recognise a situation in which property can be without an owner'. It is submitted, with respect that, so far as wreck law is concerned, there is no reason why an express abandonment should not be effective, except in so far as it seeks to avoid liabilities.[136] The real problem concerns 'implied abandonment' and how far an intention to abandon can be inferred from inaction. It would simply be unrealistic to suppose that long lost wrecks with no identifiable owner, or those whose owners (such as states) had asserted no rights for centuries,

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should not be considered as *res nullius*. It might seem to be a matter of common sense to assume that property in a 2,000 year old boat, even if not abandoned when first left, had for centuries been lost or barred.[137]

So, there appear to be two requirements for the abandonment of property rights: first, the physical relinquishment of possession or control over the vessel and, secondly, an intention to relinquish the rights of ownership. The second element is obviously far more difficult to ascertain and proof of such intention must usually be inferred from the surrounding circumstances. For example, where a wreck is lying neglected on a beach, after the lapse of a certain period of time it may be possible to conclude that ownership rights have been abandoned. However, where a ship is sunk in deep water and salvage has been impossible or commercially unviable, and perhaps too the exact position of the wreck is unknown, the owner has no choice in the matter and – unless there has been an express declaration – it is difficult to argue that there is a positive intention to relinquish rights.[138]

Although there is some academic support for the suggestion that the owner's title is not perpetual and will diminish with time and eventually lapse altogether,[139] there appears to be no direct English authority to support this view. In *The Tubantia*,[140] Sir Henry Duke P. found that there was 'no proof or presumption sufficient to convince me that the owners of the vessel, or the cargo in question, have lost whatever rights they originally had', where the vessel had sunk only eight years previously. Apart from indicating that such a short period of time will not result in abandonment, the judge surely inferred that such proof could in theory have been brought. Certainly the view of many insurers seems to be that title to a wreck never lapses through mere inactivity, even where hope of recovery had been given up.[141] However, in *The Lusitania*[142] Sheen J. appeared to lend some support to the idea that rights could be lost through effluxion of time: 'So far as the owners of the contents are concerned, it is a necessary inference from the agreed facts *and from the lapse of 67 years before any attempt was made to salve the contents* that the owners of the contents abandoned their property.'[143] However, there was also a lapse of 67 years before any attempt was made to salve the vessel and yet the court accepted that the underwriters had acquired legal title to it after paying out for the actual loss and that they remained the owners at the time the case was heard. Therefore, the time lapse, of itself, could not be a conclusive factor in determining whether the property had been abandoned. What in fact was probably conclusive here was that the owners of the vessel had appeared before the court to claim their property, while the owners of the cargo and personal possessions had not done so.[144] The lapse of time was therefore a factor, but not the only one, taken into account in deciding that the owners had intended to abandon their property.

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In *Simon* v *Taylor*,[145] although the effluxion of time issue was not raised by counsel or mentioned in the judgment, the Singapore High Court recognised the German Federal Republic as owner of a U-boat which had sunk 28 years earlier.[146] However, in *Robinson* v *Western Australian Museum*,[147] Stephen J. appeared to accept that in some circumstances it was possible that the mere passing of time without any attempt to assert possession may be treated as the abandonment of title, although it is significant that he was not prepared to find that this was the necessary result on the facts of the case before him, which involved the *Gilt Dragon*, wrecked in 1656. He found that, had it not been for legislation divesting the owner of rights, it would have belonged to the successor in title of the Dutch East India Company.[148] In another case concerning a German U-boat, which came before the Norwegian Supreme Court in 1970,[149] Eckhoff J. stated: –

> 'It is possible that an owner's inactivity over a long period, taking into account the circumstances, can be a sufficient reason for considering that the proprietary right to a wrecked vessel has been relinquished. If so, this must depend on a total evaluation of the circumstances after the shipwreck, and a balancing of the owner's interest, on the one hand, against a potential appropriator's interest, on the other. I agree...that inactivity over a certain number of years cannot in itself be conclusive.'

When the Confederate raider, CSS *Alabama*, was located by French divers off the coast of Cherbourg in 1984, the US – claiming as successor to the Confederate States of America – asserted title. In doing so, it followed 'its longstanding position that title to warships is not lost in the absence of capture or abandonment, and that abandonment could not be implied merely by the long passage of time'.[150] A finding that the US had not abandoned the *Alabama* or its appurtenances was also the basis of the decision in *US* v *Steinmetz*[151] that the US had title to the ship's bell rather than an antique dealer who had bought the bell in Britain.

It is submitted that it is entirely realistic to conclude from all the evidence, including the passage of time, that ownership has been abandoned. However, a court should be careful not to look to inactivity alone and should take into account all the circumstances. The length of time would be relevant, as would the identity of the original owner. A state owner of a warship or commercial vessel might be expected to retain an interest longer than a private owner, if only because it is more likely to have the physical, financial and political means to assert rights.[152] A corporate owner might be more likely to retain an interest than an individual owner, if only because its reason to exist will usually be financial and also it might be easier in the future for it to trace a line of succession than an individual,

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where proof of succession might be difficult after a couple of generations. The position of the wreck may be relevant. If it is situated in an easily accessible position and nothing is done, it may be easier to imply an abandonment than if it was lost in the middle of the oceans. It is submitted that there is an urgent need for a statutory code or presumption to be established setting precise periods after which property is deemed to be abandoned.[153]

It is interesting to note the method used by the US in its Abandoned Shipwreck Act of 1987. Under the Act the US asserts title to certain abandoned shipwrecks and then transfers that title to the state in or on whose submerged lands the shipwreck is located. The word 'abandoned' is not specifically defined in the Act but section 2 provides that states have responsibility for management of certain abandoned shipwrecks 'which have been deserted and to which the owner has relinquished ownership rights with no retention'. The legislative history apparently notes that, with the exception of warships and other public vessels, abandonment may be implied or inferred in those instances when an owner has not made a claim of possession or any control over the wreck.[154] Abandonment of warships and other public vessels requires an affirmative act of abandonment on the part of the sovereign nation holding title.[155]

2.3 Insurers' Interests

2.3.1 Notice of abandonment

Under marine insurance law there may be a question as to whether an owner 'abandons' its rights in a wreck to its insurers, but care must be taken as to the use made of the expression in the insurance context. In the case of an actual total loss, the underwriters – by paying out for a total loss – are thereby subrogated to all the rights and remedies of the assured in the vessel or other insured property.[156] On settlement, they become entitled to take over the interest of the shipowner in whatever may remain of the vessel, for example the benefit of any salvage or the proceeds of sale of any wreck.[157] There is a clear inference from the wording of section 79 of the Marine Insurance Act 1906, which states that the underwriters are 'entitled' to take over the rights of ownership, that unless the underwriters elect to exercise their rights, they are not forced to accept them.

Where the total loss of a vessel appears unavoidable, or where it is not commercially viable to preserve a vessel from total loss, the owners may 'abandon' the vessel to the underwriter, treat the loss as if it were an actual total loss[158] and thereby be indemnified in full. To be able to claim for a 'constructive' total loss a 'notice of abandonment' is necessary,[159] whereby the owners voluntarily cede their entire interest in the vessel to the underwriter. Under the Marine Insurance Act 1906, '[w]here there is a valid abandonment the insurer is entitled to take over the interest of the assured in

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whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto.'[160]

However, the insurer, although entitled to take over the interest of the assured, is under no obligation to do so and in practice it is usual for hull underwriters not to accept notice of abandonment, because the hull may be of little commercial value and liabilities, for example, for oil pollution and obstruction to navigation, are unpredictable. Where there is a valuable cargo, insurers are more keen to exercise rights. If underwriters take over abandoned property, for example, a sunken cargo of gold bullion, it does not become *res nullius* simply because it is at the bottom of the sea. In one case it was said that: '[s]o long as the underwriters had not abandoned [the bullion] I think it was their property and remained their property even though it was not actually accessible to them at the time.'[161] However, this was a case where the Salvage Association had signed a salvage contract only ten months after the sinking and the cargo raising operations started within four years of the casualty. Nonetheless, underwriters were still exercising claims over the gold from the *Lutine* 139 years after she sank.

The acceptance of an abandonment by the insurer may be either express, or implied from conduct. The mere silence of the insurer after notice is not an acceptance.[162] In order for acceptance to be implied from conduct, it is necessary for the underwriters to do certain acts which are consistent only with the exercise of rights of ownership. It is unclear what conduct is sufficient, but certainly it would seem that the sale of lifeboats or other items brought ashore would be enough.[163] It is also unclear how soon after the loss ownership must be asserted before it 'lapses', or how often in a given period of time ownership must be asserted. However, once there has been the necessary conduct, even if the insurers did not in fact intend to accept the abandonment, they will be estopped from denying acceptance.[164]

What if, as is the usual practice, the underwriter does not accept the notice of abandonment? In other words, what is the real meaning of 'abandonment' in this context? Does the property become *res nullius*, or does the owner retain his rights? In *Boston Corporation* v *France, Fenwick and Co.*,[165] Bailhache J. inclined to the former view.[166] However, Atkinson J. has said that: –

> '...by a notice of abandonment the assured merely makes an offer, which remains executory unless and until it is accepted.'[167]

The better view is that an unaccepted notice of abandonment does not deprive the owner of property and that abandonment by notice is not necessarily abandonment 'to all the world'.[168] It is submitted that notice of abandonment is some evidence of abandonment of ownership,[169] but it is in no way decisive: by itself, it may not be

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enough, but it may be if combined with another factor such as the passage of time. A shipowner may show an intention not to abandon even after giving notice of abandonment.[170]

2.3.2 Title of underwriter to sue

It is clear that underwriters would have to prove title and show that they had exercised their rights before they could make a claim. In the *Columbus America* case,[171] the Superintendent of Insurance for the State of New York and the Salvage Association attempted to assert a claim to gold in an 1857 wreck on behalf of a number of insurance companies that no longer existed. News reports at the time listed Lloyd's as an insurer and the Salvage Association also claimed to act as successor to the individual Lloyd's underwriters. However, the court was not presented with what it considered as proper documents assigning the claims and appears, in respect of the Salvage Association, to have denied its title to sue.[172]

Presumably, most company members of the Institute of London Underwriters can trace their succession from corporate forerunners who accepted a line on a slip 100 years ago. The Charter of the Salvage Association allows it to act on behalf of unknown commercial interests, but it is not clear on whose behalf any proceeds may be held. More difficult is the position of Lloyd's underwriters. The general theory of insurance at Lloyd's is that each individual underwriter, i. e. each name on a slip, is entitled to exercise the rights given in the Marine Insurance Act 1906. After the death of an underwriter, or for example after 100 years when they are all dead, who is entitled to sue and claim rights of ownership? Is it technically the heirs of the individuals, or can Lloyd's act in some way as agent? The difficulty is if none, or only some, of the underwriters can be traced. Inquiries at Lloyd's indicate that there may be no simple answer to this point, as most attention has been focussed on the continuing liabilities of underwriters, rather than their rights.

The famous case of the *Lutine*[173] would seem to provide some answers. She sank in 1799 off Holland with over £1 million in specie insured at Lloyd's. Some recovery work was undertaken at the time before siltation prevented further work. In 1815, after the end of the Napoleonic Wars, a Dutch salvor worked on the wreck for 40 years. Between 1857 and 1861 arrangements were made between Lloyd's and the Dutch government whereby Lloyd's would receive half of the amounts recovered. According to Lay, 'as the individual underwriters to whom the salvage properly belonged were by this time all dead, a Special Act of Parliament was passed allowing the Society of Lloyd's as distinct from individual members, to take possession of any goods on condition that the Society should pay any proved claims that might be put forward by persons entitled to a share in the property.'[174] The relevant provision, still in force, is

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section 35 of the Lloyd's Act 1871, which allows Lloyd's to join in the salving of the *Lutine* and 'hold, receive and apply for that purpose so much of the money to be received by means of salving therefrom...and the net money produced thereby...shall be applied for *purposes connected with shipping or marine insurance*' (emphasis added) according to a scheme to be confirmed by Order in Council 'after or subject to such public notice to claimants of any part of the money as aforesaid to come in, and such investigation of claims...and such reservation of rights (if any), as the Board of Trade think fit'. The fact that such a provision was thought necessary indicates that Lloyd's would probably not have any right to claim on behalf of such untraceable underwriters in the absence of an equivalent statutory sanction.[175] It would seem to follow that, in the absence of some other agreement or assignment, the rights over the insured property could only be exercised by the heirs of the individual names. If that is right, the tracing problems could be horrendous.

As the number of individual names increased,[176] it became more convenient for them not to underwrite their own risks, but to appoint agents to act on their behalf. This arrangement often took the form of an underwriter acting for a syndicate of names. In respect of syndicate underwriting, the individual names still retain full liabilities under the policy, but it will be necessary to analyse the agency agreement between the members and the agents involved. The current Members' Agent's Agreement[177] has detailed provisions dealing with death and bankruptcy of a member. Clause 14.2 of Schedule 3 (the Managing Agent's Agreement) states that in such cases, the profit or loss of a given year shall be apportioned proportionately amongst the other members of the syndicate. It would seem that such a provision might entitle the other members of the syndicate to claim the benefit of *Lutine* type recoveries, but there might still be problems in proving succession from syndicates existing 100 years ago.

In the case of old wrecks, proof that the insurers have asserted ownership rights by conduct may also be very difficult. One example of the problems which may arise concerns the liner *Titanic* which sank in 1912 and whose location on the seabed was discovered in 1985. The hull, fixtures and fittings were insured for £1 million and the insurance claim made by White Star Line, the registered owner of the liner,[178] for the actual total loss was met in full. There were 70 signatories on the Lloyd's slip underwriting the risk of loss, some of which represented several underwriters. A few of the signatures are indecipherable and most of the interests represented are apparently unidentifiable. Indemnity Marine Insurance, now the Commercial Union, was the main underwriter of the vessel's hull, even though it was liable for only 7.5% of the total insured.[179] It is unclear whether or not Indemnity Marine or Commercial Union ever asserted their rights over the *Titanic*.[180] In any event, ownership

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may still vest, wholly or partly, in the original owner, White Star, or its successors in title.[181]

Another famous liner, the *Lusitania*, was the subject of a salvage operation leading to High Court litigation in 1985.[182] As far as the hull, machinery, fittings and other goods originally owned by Cunard were concerned, it was agreed that the war risks insurer, which had paid out for a total loss, 'thereby acquired legal title to the ship'.[183] It must be assumed that the insurer (or reinsurer)[184] had asserted its rights of ownership over the vessel, although the point was not in issue.

2.3.3 Loss of right to take over property

Where an underwriter has taken over the insured property, the issue of express or implied abandonment is the same for it as for any owner. However, it is not quite clear in what circumstances, if at all, the insurer loses its right to take over the wreck under sections 63(1) and 79(1) of the Marine Insurance Act 1906. Can the insurer waive this right, expressly or by implication, or by the effluxion of time? Is there a time limit within which the right must be exercised? The point appears to be open, but it is submitted that there is no reason why the insurer should not be able to make a clear election, for example in writing to the assured, that it declines irrevocably to exercise the right. On ordinary principles, such an unequivocal election should be binding.[185] The Act lays down no time limit in which the insurer must exercise the option, although it might seem surprising if this could be done many years after the casualty. Nevertheless, it is submitted that there is nothing in the Act to prevent the insurer so doing provided, first, the assured still has an 'interest' to take over and, secondly, there is no conduct of the insurer that could be deemed as a waiver of its rights.

An insurer that wanted to have the best of both worlds might seek expressly to reserve its rights to take over the wreck. It could then avoid the liabilities of an owner, for example for wreck-raising, while waiting to see whether the wreck increased in value or became salvable. Such action would certainly be evidence that would rebut an immediate intention to waive rights under the Act, but it is difficult to argue that it would have the effect of preserving the insurer's rights under the Act indefinitely. It is submitted that the rights may still be subject to the principle of waiver by conduct, although it would be more difficult to prove such a waiver than in cases where there was no express reservation.

2.3.4 Reinsurance and war risks

Many marine risks will be reinsured and it is possible that underwriters may have reinsured a particularly valuable ship or its cargo, either as to a part of its value or (exceptionally) its whole. Perhaps

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the most relevant reinsurance issue in relation to wreck concerns war risks. During wartime the Crown often requisitions British ships under its prerogative powers. It may also charter tonnage from friendly states. As the commercial insurance market alone would be unable to bear the risk of massive war losses, the Crown has had to assist by acting as a war risks reinsurer. Thus, on 4 May 1940 the Ministry of Shipping sent a circular letter on New Arrangements for War Risks Cover on Requisitioned Ships, setting out the government Tonnage Replacement Scheme whereby requisitioned vessels would be chartered on terms that they were insured with a listed Group of War Risks Associations, with the government paying the premiums. The Associations would be reinsured by the Ministry of Shipping under a Reinsurance Agreement of 22 September 1939. The ordinary marine policies which still applied would exclude war risks and so there may be issues as to whether sinkings were caused by 'marine' or 'war' risks.[186] This, in turn, will lead to difficult questions as to the ownership of wrecks and as to which commercial underwriter (or the Crown) can exercise the right to take over the wreck under the Marine Insurance Act 1906.

One question is whether the reinsurer has any right to take over the wreck under the 1906 Act where the insurer has settled a claim. Under the Act, it is not entirely clear if the reinsurer is entitled (as against the insured owner) to exercise in its own name the insurer's right to take over the property on the insurer paying for a loss. Presumably, the reinsurer is entitled under the principle of subrogation to require the insurer to take over the wreck and to stand in its shoes if it refuses to do so.[187]

3 Crown Rights to Unclaimed Wreck

In addition to cases where a state has an ordinary proprietary interest to a wreck, for example to a warship, it may also have a prerogative right to wreck.

3.1 History and Development

Early maritime law appeared to have been more concerned with issues of general average, contribution and the jettison of goods, than issues of ownership of, and other interests in, sunken wrecks, or those washed up on the shore. Nevertheless, it seemed to be the case under early Roman law that goods cast ashore after shipwreck were still considered to belong to their original owner and were not considered to be *res nullius*.[188] It appears that the state did not claim a wrecked ship, or anything cast ashore after shipwreck, but instead restored such property to its owner.[189] Any other person taking such goods was considered to be a thief.[190]

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Later, with the onset of the Dark Ages, the rights of the owner were subjugated to those of the local feudal lord and it became the custom of such lords to seize the wreckage of ships washed ashore. It seems likely that the lords claimed to themselves coastal rights originally claimed by the common people: in ancient seafaring tradition there was a belief that the coastal population had a legal right to wreck washed ashore.[191] In any event, the 'feudal right of shipwreck'[192] appears to have flourished during the Middle Ages. This situation seems to have been the case all over Europe because it appears that 'the Church, Emperor, Kings and Republics' all made efforts to suppress the custom.[193] These efforts included the Crown jealously claiming for itself the rights of the feudal lord and, in time, these rights became a royal prerogative.

As already noted,[194] the statutory definition of the word 'wreck' covers two different types of property under Admiralty and common law. Maritime property cast upon the land after shipwreck was classed as '*wreccum maris*', while such property remaining at sea after shipwreck was known as '*adventurae maris*'. The Crown had a right to *wreccum maris* as part of its land jurisdiction. *Adventurae maris*, on the other hand, passed to the Crown as a droit of admiralty. The distinction was expressed by Sir John Nichol in *R* v *Forty-nine Casks of Brandy*[195]: –

> '"*Wreccum maris*" is not such in legal acceptation, until it comes ashore, until it is within the land jurisdiction; whilst at sea, it belongs to the King in his office of Admiralty, as derelict, flotsam, jetsam, or ligan...if the article be floating, it belongs to the sea; it is not "*wreccum maris*" but "flotsam"; if it become fixed to the land, though there may be some tide remaining round it, it may be considered as "*wreccum maris*" but it having merely touched the ground, and being again floating about, its character will depend upon its state at the time it was seized and secured into possession; whether, for instance, the person who seized it, as a salvor, was in a boat, or wading, or swimming.'

Adventurae maris originally appeared to have belonged to the finder, rather than the Crown, if the owner could not be found;[196] *wreccum maris* was taken to belong to the Crown at an earlier stage. Initially, the Crown was entitled to all wrecks which came to shore,[197] but in 1236 Henry III laid down a rule, the influence of which – according to Sanborn – was felt for over 500 years. This rule was enacted in 1275 by Edward I. The Statute of Westminster I,[198] provides: –

> 'Concerning Wreck of the Sea, it is agreed, that where a Man, a Dog, or a Cat escape alive out of the Ship, that such Ship nor Barge, or any Thing within them, shall not adjudged Wreck;

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> but the Goods shall be saved and kept...so that if any sue for those Goods, and can prove that they were his...within a Year and a Day, they shall be restored to him...'.[199]

This rule restored some of the rights of the owner, but had unfortunate consequences for some crewmen and ship's pets! Nonetheless, as Braekhus points out,[200] the rule had a rational basis in that, for many centuries, the owners of the ship and the cargo would usually accompany the vessel on its voyages. Therefore, if they did not survive the wreck, there was no-one to claim it. Presumably, the rights of successors in title were not taken into account because they may have been in far off lands. The period of a year and a day ran from the time of seizure.[201]

When the right to *adventurae maris* did fall to the Crown, there still appears to have been a distinction in the treatment of the two types of property. According to Hale,[202] the property of the owner of *adventurae maris* was, once seized by the King's officer, wholly divested;[203] there was no period – such as that laid down in the Statute of Westminster I for *wreccum maris* – in which the owner could claim the property.

The rule laid down by Edward I, or at least its common interpretation, was not finally challenged until 1771 when Lord Mansfield held[204] that even though no living thing escaped from the wreck, the property in the goods continued to remain in the owner. Lord Mansfield's interpretation of the provision in the Statute of Westminster appears to have been governed by policy reasons. He stated that: –

> '...no case is produced, either at common law, or on the construction of [the Statute of Westminster] to prove that the goods were forfeited, because no dog, or cat or other animal came alive to shore. I will therefore presume, that there never was any such determination; and that no case could have been determined so contrary to the principles of law, justice, and humanity. The very idea of it is shocking.'

He stated that the Statute was made in favour of the owner and should not be construed otherwise. Also, its provision was negatively, rather than positively phrased and meant that the escape of a dog or cat, or other animal was a medium of proof, whereby the ownership of the goods may be known. He felt that it did not contain the contrary, positive, provision 'that if neither man, dog, or cat, etc. escape alive, [the wreck] shall belong to the King'. His rationale was that '[i]f the owner of the dog or cat, or other animal was known, the presumption of the goods belonging to the same person, would be equally strong, whether the animal was alive or dead.' Only if, after a reasonable time had been allowed, no owner could be discovered, would the goods belong to the King. Various

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charters and statutes[205] then restricted the right of the Crown to both *wreccum maris* and *adventurae maris* to which no owner had established legal title within a period of a year.[206]

Initially the Crown did not concede any of its rights to the finder. By the reign of Edward I, however, when it was realised that valuable finds were being concealed, the Crown conceded one-half of the find to the finder as an encouragement to declare finds.[207] According to Marsden,[208] 'sometimes [the finder] paid into court half the appraised value; sometimes he kept half of the nets, casks, or other goods, where they were divisible, and delivered the other half to the officer of the Crown'. By 1836, the right of the finder had been reduced to one-third.[209]

3.2 Statutory Basis

More recently, the Crown's rights to unclaimed wreck have been placed on a statutory footing by the Merchant Shipping Act 1894.[210] Section 523 provides that all unclaimed wreck found in 'Her Majesty's dominions' belongs to the Crown, except where it is found in places where the right to wreck has been granted to other persons. The grant of rights to wreck by the Crown – which occurred before it was provided for by statute – was used as a means of bestowing favours and these manorial and other rights still survive.[211] For example, a past monarch ceded the Crown's rights in the Whitstable area on the Thames estuary to a local manorial lord and his successors are now entitled to personal possessions on board the 'Pudding Pan' wreck, a Roman ship known to be lying in the area.[212] Where no owner claims wreck in the possession of the receiver within one year and no other claim has been made to it by a person entitled through royal grant, section 525 provides that the receiver shall sell the wreck and – after deducting his fees, expenses, and salvage – pay the proceeds for the benefit of the Crown.[213]

The question before the Admiralty Court in *The Lusitania*[214] was whether or not the Crown had a right to unclaimed wreck found in international waters. As noted earlier, the *Lusitania* sank 12 miles off the Irish coast, outside British or Irish territorial waters. In 1982 various items of general cargo and personal property of passengers and crew were salved from the wreck and brought ashore in the UK. After the expiry of the one year statutory claim period, they remained unclaimed by the original owners or their successors. Sheen J. had to determine whether the salvors or the Crown had a better title to these unclaimed items. The duty to report wreck found in the Merchant Shipping Act 1894 section 518 had originally applied only to wreck found or taken possession of within UK territorial limits,[215] but section 72 of the Merchant Shipping Act 1906 extended this provision to apply to wreck found or taken possession of outside UK limits but later brought within those limits. Therefore, under the extended Merchant Shipping Act 1894,

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it was only when such wreck had been brought within UK limits, that there was a duty on the person in possession to deliver it to the nearest receiver. As there was no duty upon salvors of wreck in international waters actually to bring such wreck within UK limits, Sheen J. held that the Crown could have no right to such wreck under the Act.

Whether the Crown has never had a right to such wreck is arguable. Towards the end of the seventeenth century, Hale stated: 'The right of flotson, jetson, and lagon, and other sea-estrayes, if they are taken up in the wide ocean, they belong to the taker of them, if the owner cannot be known. But if they be taken up within the narrow seas,...they do belong...to the king,...'.[216] However, Marsden[217] stated that there was 'no trace' of the distinction suggested by Hale and that it had never been recognised by the Admiralty.[218] According to Nash too,[219] before 1854 a droit of admiralty was recognised in respect of all wreck, wherever found. An authority for this view is *R* v *Property Derelict*[220] in which the Crown's claim to property found derelict near Madeira was upheld.[221] Indeed, Sheen J. in *The Lusitania* believed that this case supported an alleged droit outside UK dominions.[222] However, he also concluded that: –

> 'There can be no doubt that before 1894 the Crown was entitled to unclaimed wreck found in the territorial sea of the United Kingdom as a droit of Admiralty. It is at least doubtful whether such a droit was recognised in respect of wreck found elsewhere.'[223]

There may have been doubts, but the balance of authority seems to point to the existence of such rights. Sheen J., however, was forced to the conclusion that a consolidating statute had removed any such pre-existing Crown rights. It is submitted that his decision on the interpretation of the extended Act is, at best, unfortunate and is still very much open for the higher courts to reverse. The wording was capable of the meaning asserted by the Crown and it would have been better to allow the Crown to exercise rights over such property and to reward the finder accordingly under salvage rules. In this way, where the wreck consisted of historically or archaeologically important artefacts, the state could exercise control so as to ensure appropriate conservation and disposal.

The practical effect of Sheen J.'s decision, if correct, is that recoverers of wreck found in international waters and brought within the UK will have title to it which is good against all but the true owner. The wreck will be held by the receiver for a period of one year: if no valid claims are made to it during that period it will be returned to the salvor. In other words, the maxim 'finders keepers' will apply. The decision should encourage recoverers undertaking operations in international waters to bring wreck ashore in the UK, but it should be emphasised that the salvor will only be entitled to

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that part of the wreck which remains unclaimed. This will not normally include the hull, machinery and other property which belonged to the vessel's owner because such owners will often be readily identifiable. Therefore, although greater incentive is provided by the decision for salvors to bring wreck found in international waters into the UK, the legal position in other countries may still be more favourable to salvors.[224]

4 Salvors' Rights

Having considered the rights of the original owners of wrecks, their successors in title and the Crown, it is necessary to consider the legal interests of salvors in respect of wrecked property which they have endeavoured to save.

4.1 Salvage Principles

A maritime salvage service is capable of creating rights in the property salved in a way that could not happen on land. Although it may be possible to argue that there should be a restitutionary remedy for saving land-based property,[225] the general view has been that the land 'salvor' obtains neither a personal cause of action against the owner of property saved, nor any rights over the property itself.[226] Where there have been all the elements of a successful maritime salvage the salvor has an action *in personam* against the owner of the salved property[227] but, more importantly, is also entitled to a maritime lien over it.

A salvage reward can be claimed where a salvor voluntarily succeeds in saving maritime property[228] which is in danger on the high seas or in tidal waters.[229] The reward, calculated by taking into account a large number of factors, is available on a 'no cure – no pay' basis and can never exceed the value of the property saved. The reward is payable by each interest salved according to the proportion its salved value bears to the whole. Thus, a salvor of a wrecked ship (having a salved value of $100,000) along with its cargo (having a salved value of $900,000) will be able to claim 90% of any reward directly from the cargo interests.

The right to a reward is not dependent on contract.[230] It arises out of the jurisdiction exercised by the Admiralty Court and operates as an independent principle of maritime law,[231] now recognised by international conventions.[232] The underlying public policy factor that has influenced the development of the law has been the desire to encourage salvors to assist others whose lives or property are in distress. For this reason salvors have been granted rights which are extensive both in relation to the owner of the salved property and other claimants who might wish to enforce debts in respect of the property. Evidently, this policy factor would have less force in

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respect of wrecks at the bottom of the sea, where no lives were at risk, although it is still arguable that the property is at risk in the sense of being permanently lost to its owners.

4.2 The Salvors' Maritime Lien

The principal weapon available to the salvor is the maritime lien.[233] This is an inchoate privileged right granted over the salved property[234] which may be perfected by an action *in rem* in the Admiralty Court of the Queen's Bench Division of the High Court.[235] The salved property can be arrested and ultimately sold in order to provide security for the salvor's claim. A maritime lien does not depend on possession, but will travel with the salved property even into the hands of a bona fide purchaser for value.[236] The preponderant opinion, at least academically, is that a maritime lien is a substantive right, rather than a procedural means of asserting a claim,[237] although there is a controversial 3:2 decision of the Privy Council to the contrary.[238]

Most legal systems would accord a maritime lien the highest priority over other claims.[239] A salvage maritime lien will normally take priority over pre-existing liens, as the actions of the salvor will have preserved the property which would otherwise have been unavailable to any preferred creditors.[240] One consequence of this justification is that a later salvage lien will take priority over an earlier salvage lien – a reversal of the normal principle that liens of the same kind would usually rank in the order in which they arose. The salvors' rights will be extinguished two years after the services were rendered.[241]

It is difficult to consider the maritime lien separately from the action *in rem*, but the rights that the lien gives to a salvor (which are not necessarily created by agreement) can be very effective.

4.3 Salvors' Possessory Interests

In addition to the rights granted by having a maritime lien, a salvor may independently be able to exercise rights of possession over a wreck.[242] In *Cossman* v *West*[243] the Privy Council emphasised the distinction between the case where a ship was technically a 'derelict' – where it was abandoned by its master and crew without hope of recovery or intention to return to it[244] – and that where it was still in the control of its master. In the latter case, the master remains in possession of the ship and can make decisions as to its operation, for example whether to accept the services of other salvors. Where the master has temporarily left the ship, the salvors 'are bound on the master's returning and claiming charge of the vessel to give it up to him'.[245] In the former case, the salvors who first take possession of the ship 'have the entire and absolute possession and control of the vessel, and no one can interfere with them except in the case of

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manifest incompetence'.[246] The issue may be important in the context of subsequent attempts by the owner to exercise rights to control the salvage operations[247] and where there are contests between competing salvors.[248]

4.3.1 Possession against owner

The assumption in *Cossman* v *West*[249] is that a salvor of a derelict has exclusive possession until paid, even against the owner. The decision actually concerns the question of when a vessel becomes a total loss under an insurance policy and the issue of whether the owner would be entitled to possession was not directly raised. It is submitted that the decision ought not to be considered as binding on this point.[250] Braekhus, in a seminal article, was of the opinion that the owner's right to make decisions about salvage should be the same whether the vessel was abandoned or not.[251]

The position is easier where there has been misconduct of the salvor. The UK has never specifically enacted Article 3 of the 1910 Salvage Convention which removes the right to salvage remuneration where there has been an express and reasonable prohibition 'on the part of the vessel'.[252] The Article does not make it clear whether it would apply in the case of a derelict. Article 19 of the 1989 Salvage Convention is similarly worded but in slightly wider terms, referring to such a prohibition coming from the owner of the salved property (presumably whether the vessel is technically derelict or not). It may be that there is a 'reasonable prohibition' by an owner out of possession even where there is no 'manifest incompetence'. Indeed, the expression 'manifest incompetence', as used in *Cossman* v *West*, is usually applied in the context of a competition between salvors, rather than as a limitation on the rights of an owner. The difficult question is where an owner wants to resume possession in circumstances where there is no real criticism of the salvor, as to do so might seem to undermine the salvor's security where it is not possible to perfect it through an action *in rem*.[253] It is submitted that the best approach is to allow the owner to resume possession, by itself or through its agents, but to preserve any salvage claims of the first salvor.[254]

4.3.2 Competing salvors

Where there are salvors competing over a derelict, the first salvor is entitled to protect its possessory rights by using the normal civil law remedies, for example by seeking damages or an injunction. The effectiveness of an injunction, in particular, will depend on the extent to which the second salvor is legally or practically amenable to the control of the court. The High Court has been held to have jurisdiction in respect of injurious acts on the high seas, for example where one salvor dispossesses another.[255] The crucial question is

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often to establish whether the nature and extent of the acts of the first salvor in relation to the wreck are sufficient to constitute possession. This is a question of fact and degree in each case. In order to establish that they are in possession of a derelict the salvors must show 'firstly, that they have *animus possidendi*, and secondly, that they have exercised such use and occupation as is reasonably practicable having regard to the subject matter of the derelict, its location, and the practice of salvors'.[256]

A leading case is *The Tubantia.*[257] A Dutch vessel, rumoured to contain over £2 million in gold, sank in 1916 in international waters in the North Sea[258] to a depth of about 120 feet. The first salvors found the wreck and in the 1922 and 1923 diving seasons began operations. These involved keeping divers and vessels at the scene, the mooring of buoys over the wreck and the positioning of plant and equipment around the vessel which was likely to be swept away. Holes were cut in the ship and obstructions removed. The weather allowed only about eight minutes per day in the holds and only 25 days were available in 1923. The second salvors arrived in July 1923 and claimed the right to join in the salvage operation and interfered in the work of the first salvors. The latter claimed a declaration as to their possessory rights, an injunction to restrain interference by the second salvors and damages.

The judge relied on Pollock and Wright's *Possession in the Common Law* to make a number of inquiries in order to establish possession. These included the following: 'what are the kinds of physical control and use of which the things in question were practically capable? Could physical control be applied to the *res* as a whole? Was there a complete taking? Was the [first salvor's] occupation sufficient for practical purposes to exclude strangers from interfering with the property? Was there the *animus possidendi*?'[259] Taking the evidence as a whole, the judge concluded that the first salvors were in possession at the relevant time and it is interesting to consider some of his reasons. The first salvors did with the wreck what a purchaser would prudently have done and, if the owners themselves had put themselves in the same position as the first salvors, the owners would have been held to be in actual possession. The big difficulty with the first salvors' case was proving possession of something that was at the bottom of the sea and which could only be entered in fine weather and for short periods of time. It might have been possible to argue that the vessel was incapable of possession for these reasons, or that it was only possessed for short periods of time. However, the judge was reluctant to come to such a conclusion as this would have discouraged enterprise. Instead, he was prepared to find that the first salvors were in effective control of the whole wreck and in a position to prevent useful work by newcomers. The court was influenced by the conduct of the second salvors, who had merely taken advantage of the enterprise of the first salvors in finding the wreck. It was

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important that the first salvors could demonstrate that they were taking such steps as were possible to exploit the wreck. It would have been different if there had been manifest incompetence by the first salvors and it seems clear that – where the first salvors cannot demonstrate possession – there is no salvage remedy to protect them from a competing salvor using their knowledge of the location of the wreck. The remedy of injunction was available for a high-handed and deliberate trespass and damages were recoverable (if proved) for the wilful prevention of the completion of an enterprise capable of producing profit. The court was unwilling to grant a declaration of possessory rights, partly because such rights are necessarily 'of a limited and perhaps transitory kind'.

In 1924, with huge numbers of ships still on the seabed after World War I sinkings, it is easy to see that the court would want to encourage 'bold and costly work...of great public importance'.[260] The same policy considerations might not apply in the 1990s where salvors were competing over a wreck which had historical or archaeological significance.[261] Although there may be little to choose between two treasure hunters, it may be that a second salvor could demonstrate that it was more likely to carry out operations which would preserve the archaelogical value of the wreck. It is submitted that if the first salvor was using 'smash and grab' techniques, a court would be entitled to award possession to the second salvor, either because it could require a high degree of proof of possession by the first salvor, or because the first salvor would be guilty of 'manifest incompetence', taken at its widest.

Nevertheless, the principles in *The Tubantia* have been followed more recently in *The Association and The Romney*,[262] where the MOD granted separate diving rights to two persons in respect of four naval vessels which sank off the Scilly Isles in 1707. A third person claimed to salve the wrecks and denied any possessory title. At the interlocutory stage the first person was able to satisfy the court as to possession, which consisted of continuous buoying in 1967–69 and work during every possible day in the diving seasons. However, an interlocutory injunction was refused on a balance of convenience[263] as the third person claimed that it was an associate of the second person and entitled under the MOD agreement to work on the wreck. There were difficult questions of contractual interpretation and of fact: moreover, damages would have been an adequate remedy.[264]

The first salvors in *The Tubantia* and *The Association and The Romney* had done all they could to exercise possession. It may be that as diving techniques develop, so may the nature of the activities necessary to constitute possession. The latest remotely operated vehicles (ROVs) and submersibles are capable of mapping, marking out and attaching buoys. In a recent US case,[265] a judge has been prepared to find that in the deep ocean, 'exercise of effective control is achieved not through physical presence of a human being at the

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ocean bottom', but instead through a combination of four factors: (i) locating the object searched for, (ii) real time imaging of the object, (iii) placement or the capability to place teleoperated or robotic manipulators on or near the object (capable of manipulating it as directed by human beings exercising control from the surface), (iv) present intent to control (including deliberately not disturbing) the location of the object. The latter he described as 'telepresence' and 'telepossession'.[266] While the law must develop, it might be thought that such an approach comes close to giving protection for discovering the location of the wreck, rather than for exercising possession. The better view is that mere discovery does not give a right to possession.[267] It should not be forgotten that the discoverer might claim a generous salvage reward for assisting in the saving of the property. Possession by remote control should be possible, but there must be more than the mere capacity or intention to possess.[268]

4.4 Interests under Salvage or Raising Contracts

Although salvage operations to a vessel may be performed consensually, it is the performance of successful services that gives rise to the salvage reward rather than the fact of agreement. However, it is legally possible, and commercially normal, to agree a salvage contract,[269] although the fact that the owner agrees to the operations does not necessarily result in a contract.[270]

It may be that the owners of the property engage a contractor to raise a wreck under an ordinary contract for work and labour, i. e. not a 'no cure-no pay' contract but one for a lump sum, or at a daily rate. In such circumstances the contractor is not a salvor and has no maritime lien over the raised property, unless, perhaps, it has exceeded what was required under the contract and thereby become a salvor.[271] Nor will there be a possessory lien at common law[272] or a right against non-parties to the contract.[273]

When owners or underwriters grant permission for diving operations to take place to raise valuable cargoes, it is usual for percentages to be agreed in advance. In these percentage deals the precise circumstances of the contract must still be examined to see if it is on a 'no cure-no pay' basis. If so, there could be a salvage service. In the period immediately after World War II, it was common for the government to agree with contractors that valuable cargoes would be split 20% for the contractor and 80% for the government. Today, it is more likely that the contractors will make an offer that will vary according to the difficulty and expense of the intended operation. They may be required to pay, say £1000 for diving rights for two years, with a percentage of finds to be agreed after competitive tender. For general commercial cargoes, other than bullion, a contractor might be expected to pay the insurer 5–10% of the net proceeds, after the deduction of all costs.[274] It should not

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be ignored that it is enormously expensive, and risky, to set up a recovery operation. The agreement for salving the 431 gold bars, worth over £40 million, recovered from HMS *Edinburgh* was that 37.2% went to the USSR, 17.8% to Britain and 45% to the salvor.[275]

Where a contractor does have a wreck-raising contract from the owner, there may be difficult questions as to whether it can supersede a salvor who was first in possession. The rights may depend upon whether the owner itself could have dispossessed the salvor. The difficulty for the latter is in knowing whether the contractor, or the owner, does have the legal right to regain possession. The issue might have to be settled in court to avoid conflict at the site.[276]

4.5 Salvage Conventions and Wreck

It has been important at various times internationally to distinguish between the saving of a vessel which was manned, one which had been left by its crew and one which had sunk to the bottom of the sea.[277] Continental systems of law, such as those in France and Italy, distinguished between salvage and assistance, the former applying to services to a vessel which had been left by the crew. The distinctions were often important in deciding the entitlement of the salvor in respect of the property recovered. Fixed proportions of one-third, or eight-tenths, of the things salved could be claimed, depending on the categorisation. In England, the concept of derelict was important in deciding the residual rights of the Crown.[278] Where no owner appeared the property passed to the Crown, but it was apparently the settled practice of the Court of Admiralty to give a moiety to the finders as salvors.[279] Later the amount became discretionary and English law ceased to make a formal distinction between the salvage of vessels, floating, manned or wrecked.

The Salvage Convention 1910, Article 1 abolished internationally any distinction between salvage and assistance and adopted the broad English notion of salvage. It has generally been assumed in English law that a ship and its cargo at the bottom of the sea are still subject to danger, one of the prerequisites of a salvage service.[280] In other systems it may be argued that vessels lose their character of being maritime property once they have sunk so that salvage rules cease to apply.[281] The Salvage Convention 1989 unfortunately[282] makes no mention of sunken vessels or their cargoes in its Article 1 definitions of 'vessel' or 'property' which can be salved. It is submitted that there is no doubt on the wording of Article 1, taking into account the travaux preparatoires, that salvage can be claimed under the Convention whether services are performed to floating or sunken vessels or cargo.[283] It is likely that the UK will ratify the 1989 Salvage Convention, but the Convention still leaves national courts to decide whether property on the seabed is in danger.[284] If there is no danger, the recoverer will presumably only be entitled to bring a claim based in contract.[285]

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4.6 Salvage and Finding

The assumption of the 1989 Salvage Convention is that, unless states exercise a reservation in respect of 'maritime cultural property', it will be normal to apply the salvage rules to wreck, including the giving of a maritime lien to the salvor.[286] Salvage law presupposes that the salvor does not become the owner of salved property, but has an interest in it secured by a maritime lien. The salvage remuneration is calculated according to many factors,[287] but can never exceed the salved value. The salvor will be awarded a proportion of the salved value and the owner will be entitled to the remainder (for example where the property has been sold). In some cases, national legislation will make the state the owner of abandoned property, but the notions of salvage will still prevail.[288] However, if there is no known owner, or if an identifiable owner has abandoned ownership, expressly or impliedly, the recoverer of wreck may be able to claim as a finder.[289]

At first glance, it may seem uncontentious that a discoverer should be entitled to claim property not claimed by anyone else. The well-known finding cases,[290] such as *Parker* v *British Airways Board*,[291] recognise that a number of persons might have a right to claim an interest in lost goods, including the occupier of land, although the finder may have a greater interest than all but the true owner. However, cases such as *The Lusitania*[292] can only encourage treasure hunters. At one time this activity may have been thought of as a worthwhile endeavour by entrepreneurs, but today there is greater recognition of the need in many cases for properly conducted archaeological survey and excavation. The problem over the application of the law of finding or the law of salvage has been particularly prominent in litigation in the US over ships containing vast amounts of bullion which were wrecked off US coasts. The legal issues can only be outlined here,[293] but two cases are particularly illustrative: *Treasure Salvors Inc* v *The Unidentified, Wrecked And Abandoned Sailing Vessel*[294] and *Columbus America Discovery Group* v *The Unidentified, Wrecked And Abandoned Sailing Vessel*.[295] There appears to have been a division of opinion between the courts and the leading American author, Norris.[296] Norris was very reluctant to apply the law of finds in the context of wreck, preferring to rely on the rules of salvage.[297] By contrast, the courts have been prepared to reject the theory that title to such property can never be lost and have applied the law of finds.[298] In *Treasure Salvors* it was accepted that 'in extraordinary cases, such as this one, where the property has been lost or abandoned for a very long period...the maritime law of finds supplements the possessory interest normally granted to a salvor and vests title by occupancy in one who discovers such abandoned property and reduces it into possession'.[299] In *Columbus America*, abandonment was held, at first instance, to be a question of fact, a voluntary relinquishment of a right, consideration being

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given to 'the property, the time, place and circumstances, the actions and conduct of the parties, the opportunity or expectancy of recovery, and all other facts and circumstances.'[300]

In the *Treasure Salvors* case, the *Nuestra Señora de Atocha*, a Spanish galleon, was en route for Spain, with a cargo of bullion (worth perhaps $250 million) exploited from the mines of the New World, when she sank in 1622 in a hurricane off Florida, on the continental shelf but outside US territorial waters. After an expenditure of some $2 million and much trouble, the plaintiffs retrieved gold, silver, artefacts and armaments valued at $6 million and claimed these as finders. The US intervened and claimed ownership of the vessel, but lost. The court applied the law of finds rather than the law of salvage. The Court of Appeals (5 Cir) affirmed the judgment, but refused to hold that the plaintiffs had exclusive title as against other claimants who were not before the court.[301] It did, however, consider it to stretch a 'fiction to absurd lengths' to treat a wrecked vessel whose very location had been lost for centuries as though its owner existed. The court also rejected the claim of the US government based on an alleged inheritance of the English prerogative power which was apparently assumed to exist[302] over unclaimed wreck found on the high seas.

The decision on finding is perhaps unsurprising, given that there was no claim by the original owner Spain or any South American country. However, it can be inferred that the court would have rejected such a claim on the abandonment ground. If it is legally possible to abandon property[303] then this case – with a 350 year period of inactivity – would be one of the strongest.[304] The difficulty is whether to apply the finding principle to more modern wrecks.

In *Columbus America Discovery Group* v *The Unidentified, Wrecked And Abandoned Sailing Vessel*,[305] the steamer SS *Central America*, reputedly carrying gold miners with a fortune in gold, sank in 1857 after encountering a hurricane 160 miles east of Charleston. The plaintiffs were a company that had spent 13 years of study and over $10 million in finding the wreck and its cargo. In 1987 they applied to the court, claiming ownership as finders or a liberal salvage reward, and an injunction to prevent others interfering in recovery. Various other claimants joined suit, including (i) the trustees of Columbia University (who claimed the plaintiffs had used information belonging to them, such as sonar records) and (ii) a list of 38 insurance companies in the UK and US (which claimed they had paid out on cargo insurance policies). The claim of the trustees (presumably for salvage) was dismissed as they had failed to prove that any information was used, or that it helped to locate the wreck.[306] The claim of the insurance companies is far more important. The problem for the companies was that there were no copies of any insurance policies, invoices for shipments, bills of lading, bills of exchange, proofs of loss, amounts paid, or other records. The insurance companies instead had to rely on contempor-

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ary newpaper articles to show that some gold was insured by them, but it seems that there were many conflicts in the various reports. The judge at first instance, Kellam D.J., apparently held (i) that not all the insurance claimants could even prove that they had title to sue, as some of the companies were now defunct,[307] (ii) that the insurers could not prove exactly which cargo had been insured, (iii) that the insurers had in any event abandoned any claim they might have had. On appeal, it seems to have been assumed by the majority that the trial judge had decided that the insurers had proved a prima facie case of ownership and that the only relevant issue was abandonment. The reasoning of the first instance decision is not always easy to follow, but the additional grounds, given above, do seem to have been taken into account.[308]

The factors that Kellam D.J. found to be important, particularly in showing abandonment by the insurers, were (a) the absence of any documentation, (b) the failure of insurers to retain any records, given the practice of destroying documents only if a subrogated claim was not expected, and the absence of any evidence that documents were accidentally destroyed, (c) that evidence existed that some insurers had kept some records for over 100 years, (d) the contemporary evidence that some passengers carrying considerable quantities of gold were uninsured, (e) the fact that locating and recovering the wreck were beyond any known abilities in 1857 and for some 100 years thereafter, (f) the failure of any insurer or the Salvage Association to attempt to locate or recover the wreck in the last 20 years when techniques became available, (g) the length of time that had elapsed, (h) the absence of any of the gold being listed as an asset of the insurance companies for taxation purposes.

The reasons need to be examined closely. Kellam D.J. disregarded the contentions of the insurers that they had never signed documents abandoning rights, never publicly abandoned them and had always claimed to own the gold. Although the judge dismissed the insurers' assertion that they would be unlikely ever to renounce title to so valuable a non-perishable cargo, it is submitted with respect that it does have force. With a cargo of gold the insurer would have no reason whatsoever to want to abandon ownership. The position might be different in respect of cargoes or hulls which could cause liabilities. The absence of documentation (a)–(c) is at best equivocal, given the passage of time and does not necessarily point to abandonment alone.[309] On appeal, the majority of the court found that Kellam D.J. had been wrong in concluding that the documentation had been deliberately destroyed and that this was a crucial factor in deciding that there had been deliberate abandonment. He had inferred from the present practice of destroying stale documents that the absence of documentation in the case must point to an intention to abandon title at some time in the past. The majority decision on appeal is surely right in refusing to draw such a conclusion, as the evidence would certainly be equivocal.

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Likewise, a failure to undertake salvage operations (e) – (f) would point simply to a calculation that the efforts might not succeed.[310] The point about company accounts would need precise evidence as to the practice of insurers but it seems unlikely that such remote prospects of recovery would have been included in accounts, given the state of knowledge and technology at the time. Indeed, to include might well have been misleading to shareholders.[311] The lapse of time (g) is certainly relevant, but will always be arbitrary, in the absence of a statutory definition. The fact that so much endeavour was displayed by the finders is a reason for giving them an exceptionally generous salvage reward, but a court is not necessarily forced to conclude that the insurers' wariness of exercising similar endeavour is evidence of abandonment. It does not appear that Kellam D.J., or the Fourth Circuit Court of Appeals, addressed the issue as to whether the insurers had ever taken over the cargo under marine insurance law or whether these rights had been waived.[312]

It is submitted that there is no reason why the insurers' claims could not have succeeded, provided they could produce clear documentary evidence that (i) they had title to sue and (ii) that the policies precisely covered the goods recovered. The real problem for the insurers was the weakness of their case on these two points. The absence of the documentary evidence, coupled with the fact that some portion of the cargo was certainly uninsured, must have presented enormous difficulties to the claim unless the courts are prepared to adopt some principle of apportionment of proceeds rateably amongst the various insurers of admixed cargo. The findings, both on abandonment and on the documentary evidence, would have been a severe blow to attempts by insurers to assert rights over wreck. The decision on appeal is to be welcomed, in so far as it indicates a reluctance to hold that insurers have abandoned title (and thereby to apply the law of finds) except with the clearest evidence. However, a Petition for Rehearing *en banc*, seeking to reargue the case before all nine Judges of the Circuit, was filed in September 1992.

The US cases disclose a professional finding industry (with a thriving market in assignable rights, interests and information) which the US courts have been willing to favour, at least until the recent appeal decision in *Columbus America*. 'The law acts to afford protection to persons who actually endeavour to return lost or abandoned goods as an incentive to undertake such expensive and risky ventures'.[313] The robust view taken by the US courts does have the merit of providing comparatively simple solutions to complex cases, for the fewer ownership claims that are recognised, the easier it is to arrange recovery operations and to distribute the proceeds. However, it must be questioned whether the comparatively unrestrained endeavours of such an industry is the most desirable system to allow. The existence, and recognition, of a wider underly-

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ing state or public right would have the merit of enabling material of archaeological or historical interest to be made available for research and public education and enjoyment.[314] Indeed, in the Abandoned Shipwreck Act of 1987 the USA has recognised such wider educational and historical interests by declaring ownership of certain abandoned wrecks in or on the submerged lands of a state and then transferring these to the relevant state.[315] The law of salvage and finds are disapplied in these waters in respect of such wrecks, but will still be applicable to some shipwrecks on those lands[316] and to most wrecks beyond the three mile limit. It is interesting to note that rejected drafts would have extended the scope of the Act to the continental shelf and would have specified wrecks over 100 years old.

5 Conclusions

An underlying question of principle is which legal rules should be applied to the competing interests that might arise in relation to wrecks? There are undoubtedly public and international[317] interests that must be protected, for example, where the wreck constitutes (i) a historic or cultural relic, or (ii) a grave containing human remains. These can be catered for by specific legislation, such as – in the UK – the Merchant Shipping Act 1894, the Protection of Wrecks Act 1973 and the Protection of Military Remains Act 1986. The trend in international law is to allow states to regulate wrecks when the property involved is maritime cultural property of archaeological and historical interest and is situated on the seabed.[318] In the UK the 1894, 1973 and 1986 Acts constitute a regime of sorts, but there is a need for a modern codification.[319] There is every reason for submitting that, whether or not the decision in *The Lusitania* is right,[320] it would be better if the fullest possible advantage was taken of the position under international law to assert state rights in respect of wreck found on the continental shelf, or on the high seas and brought within the UK.[321] Admittedly, such a provision might encourage forum shopping, but that is no reason to refrain from putting UK law on a sounder basis. Moreover, the Crown should exercise its rights in a more sensitive way.[322]

At present, the commercial interests of salvors, treasure seekers and auctioneers are treated as paramount, whereas there is a need to recognise and give due weight to broader cultural interests. Too much damage has been caused by allowing unrestrained treasure recovery, but failure to reward finders or recoverers can result in them concealing their discoveries. It would be unrealistic to suppose that governments are going to provide new funds to pay for rewards. Where possible, a clear distinction should be made between ships and cargoes which have only a commercial value (for example,

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where a modern ship sinks while carrying an expensive ore cargo) and those which may have some historical or cultural value.[323] In the case of the latter, the rights of states[324] would be better protected by not applying the law of finding, but by recognising persisting rights of ownership, with residual state rights of ownership where the nationality of the original owner is known or can be surmised.[325] It would then be necessary to decide whether to apply a modified law of salvage in respect of strangers who 'save' property from the wreck. Archaeologists maintain that in some cases it may be far better to leave a time capsule *in situ*, rather than disturb it, and that the law of salvage merely encourages unscientific removal.[326] Realism again dictates, however, that there will be no government funding for any wreck policing service and that commercial and amateur divers[327] will continue to explore and exploit wrecks.

The major problem that still needs to be addressed by salvors and archaeologists is that of ownership. At present, it is extremely difficult to decide who has ownership rights and in what circumstances their rights are lost. While it is proper to recognise wider interests, there is perhaps an increasing tendency to discount the rights of the original owners (*and* their insurers), even where these persons are clearly identifiable.

Is there a sensible regime that will satisfy some or all of these competing interests? There are a number of reform proposals, with varying degrees of radicality, that could be considered nationally and internationally. At the very least, it is submitted that, apart from recognising that the widest possible Crown (i. e. public) rights should be asserted, legislation should provide a clear code for dealing with ownership. The legislation could set out principles on which ownership issues can be decided. It could create a presumption as to abandonment of ownership after a given period of time. This date will inevitably be an arbitrary one, but it is suggested that a period of 100 years from the date of the wreck would suffice.[328] A phasing-in period might be needed in order to give notice, especially to foreign interests, that rights could be lost through inaction. Perhaps the subject of wreck is now ripe for an international Convention that will deal not only with the cultural interests, as with the 1985 draft European Convention on the Protection of the Underwater Cultural Heritage, but also with commercial issues.[329] A comprehensive international convention covering commercial and cultural interests that was in force might be preferable to the continued uncertainties about the rights of states and individuals,[330] but it is easy to expect too much of conventions and to forget how long it takes to achieve international agreement and implementation. There will rightly be little support for a time-consuming diplomatic process that is doomed to failure. It might be more realistic to encourage national or regional initiatives to give better guidance to all those interested in wreck.

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Notes

1 This article derives from work undertaken by the authors for a chapter entitled 'Interests in Wreck' in Palmer and McKendrick (eds.) *Interests in Goods* (1993, Lloyd's of London Press), chapter 13.
State rights of intervention in relation to wrecks are discussed, *ibid.*, at 3.2.

2 The youngest vessel designated under the UK Protection of Wrecks Act 1973 on account of its 'historical, archaeological or artistic importance' is the *Iona II*, a passenger ferry lost in 1864. The reason for her designation was that she represents a one-off design for a fast passenger ferry for the Clyde and is also a good example of an early Federal blockade runner. Under the Australian Commonwealth Historic Shipwrecks Act 1976 a number of twentieth century wrecks have been declared 'historic' and in fact the first wreck declared as an 'historic wreck' under that Act was that of a Japanese submarine which was sunk in 1942 by the Royal Australian Navy: J Amess, 'Operation of the Commonwealth Historic Shipwrecks Act', in *Proceedings of the Second Southern Hemisphere Conference on Maritime Archaeology* (1983). See also the *Columbus America* case, 4.6 below.

3 'A vessel broken, ruined, or totally disabled by being driven on rocks, cast ashore, or stranded; a wrecked or helpless ship; the ruins or hulk of such': *Oxford English Dictionary* (2nd edn., 1989).

4 For further discussion of these terms, see 3.1 below.

5 In *Cargo ex Schiller* [1877] 2 PD 145 it was held, citing *Att. Gen.* v *Sir Henry Constable* [1601] 5 Co Rep 106, that 'flotsam, is when a ship is sunk or otherwise perished, and the goods float on the sea. Jetsam, is when the ship is in danger of being sunk, and to lighten the ship the goods are cast into the sea, and afterwards, notwithstanding, the ship perish. Lagan...is when the goods which are so cast into the sea, and afterwards the ship perishes, and such goods are so heavy that they sink to the bottom...'.

6 For the meaning of 'derelict', see 2.2 below.

7 Merchant Shipping Act 1894, s.510(1). The origin of this section was the Merchant Shipping Act 1854 s.2. The 1854 Act was a consolidating statute. The earlier Wreck and Salvage Act 1846 had no definition of wreck. The breadth of the area is unclear from the statutory wording. What exactly does 'found in or on the shores of the sea' mean? Does it mean 'found in the sea, or on the shores of the sea', or 'found in the shores of the sea, or on the shores of the sea'? The two interpretations would lead to quite different results. In practice the phrase has been taken to mean property found in territorial waters or on the foreshore.

8 For example, see *Att. Gen.* v *Sir Henry Constable* [1601] 5 Co Rep 106, 'if any [flotsam, lagan or jetsam] by the sea be put upon the land, then they shall be said wreck'. See also *R.* v *Forty-nine Casks of Brandy* (1836) 3 Hagg Adm 257 in which Sir John Nicholl cites Blackstone: 'It is to be observed...that in order to constitute a legal wreck, the goods must come to land; if they continue at sea, the law distinguishes them by the uncouth appellations of jetsam, flotsam, and ligan. These three are, therefore, accounted so far a distinct thing from the former, that by the King's grant to a man of wrecks, things jetsam, flotsam, and ligan will not pass'. (*Bl. Com.* vol. 1, 290, 292).

9 See further 3.1 below. See also S. Lillington, 'Wreck or Wreccum Maris? *The Lusitania*' [1987] LMCLQ 267.

10 See 3.1 below for further details. See *Halsbury's Laws* (4th edn.), Vol. 43, para. 1008 and R. Marsden, 'Admiralty Droits and Salvage — *Gas Float*

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Whitton, No.II' (1899) LX LQR 353, at p. 354. Droits also included, for example, sea-marker buoys, and wines and spirits anchored for safe-keeping to the sea bottom by smugglers.

11 Aircraft (Wrecks and Salvage) Order (1938), Art. 2(b) (S R & O 1938, No.136).

12 Hovercraft (Application of Enactments) Order 1972 (SI 1972, No. 971), Art.8(1).

13 New Zealand Shipping and Seamen Act 1952, s.348(2).

14 P. Davies, 'Wrecks on the New Zealand Coast' [1983] NZLJ 202 at p. 205.

15 The term 'wreck' itself is not defined.

16 These issues can only be touched upon here, but see further, I. Shearer (ed.), *D. O'Connell, The International Law of the Sea* (1984) pp. 911–918; L. Prott, P. O'Keefe, *Law and the Cultural Heritage,* Vol. I (1984), pp. 89–107; L. Van Meurs, 'Legal Aspects of Marine Archaeological Research', *Special Publication of the Institute of Marine Law, University of Cape Town, No.1* (1985); B. Allen, 'Coastal State Control over Historic Wrecks Situated on the Continental Shelf as Defined in Art.76 of the Law of the Sea Convention 1982', *Special Publication of the Institute of Marine Law, University of Cape Town, No.14* (1991).

17 The UK position is certainly that a foreign vessel engaged in salvage work in territorial waters cannot, by analogy, claim to be exercising innocent rights of passage.

18 See further, 4.1 below.

19 Per Phillimore L. J. in *The Putbus* [1969] P 136, at p. 155. See also G. Marston, *The Marginal Seabed* (1981), p. 203.

20 This is now usually confirmed by statute, see the Merchant Shipping Act 1894, s.523; the US Abandoned Shipwreck Act of 1987, s.6; others are mentioned in *O'Connell, op. cit.*, p. 918; Prott and O'Keefe, *op. cit.*, pp. 192–194.

21 See the discussion on *The Lusitania* [1986] QB 384, at 3.2 below.

22 See 2.2 below.

23 See *O'Connell, op. cit.*, p. 911, Allen, *op. cit.*, p. 14. Where an 'ownerless' vessel is situated in the waters of a coastal state it seems probable, as a matter of principle, that the rights of the flag state to ownership would not be as strong as those of the coastal state.

24 See further, 2.1.2 below. Consider also the nationality of the insurers (if they have rights, 2.3 below) and any subsequent purchasers of interests in wrecks.

25 Although in some cases it may be possible to argue that a wreck has close cultural or historical connections to the coastal state, see Van Meurs, *op. cit.*, p. 62.

26 (1886) 33 Ch D 562.

27 It is interesting that the US Abandoned Shipwreck Act of 1987 expressly applies to shipwrecks 'embedded' in the submerged lands of a state or coraline formations.

28 *Op. cit.*, p. 914, f.n.314.

29 See Van Meurs, *op. cit.*, pp. 40–41 and cf. the approach taken in *Klein* v *Unidentified, Wrecked and Abandoned Sailing Vessel* 569 F.2d 330 (5 Cir, 1985), J. Prisbe, 'Law Determining Ownership of Wreck in the United States' [1987] 1 LMCLQ 267. The Court held that as the eighteenth century wreck had become embedded in the soil of the territorial sea, it belonged to the USA, not the finder (and see 4.6 below).

30 See 4.6 below and e.g., *Treasure Salvors Inc* v *The Unidentified, Wrecked and Abandoned Sailing Vessel* [1981] AMC 1857, *Columbus America Discovery*

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Group v *The Unidentified, Wrecked and Abandoned Sailing Vessel* [1989] AMC 1955, [1990] AMC 2409, (1992) 337 LMLN 1; the *Klein* case [1985] AMC 2970, at p. 2974, and D. Owen, 'Some legal troubles with treasure' (1985) 16 JMLC 139. B. Alexander, 'Treasure salvage beyond the territorial sea' (1989) 20 JMLC 1, argues for widest jurisdiction to be accepted by admiralty courts over wreck and this is in accordance with the approach of the Admiralty Court in England.

31 See e.g. *The Tubantia* [1924] P 78 and Supreme Court Act 1981 s.20.

32 Allen, *op. cit.*, pp. 17, 28 would seem to suggest that where a wreck which belonged to an identifiable owner was abandoned so as to become *res nullius*, the law of the finder should apply. Of course, one would need to refer to the law of the original flag to see whether it recognised the abandonment. It is only where the nationality or flag is unidentifiable that the choice arises between the law of the site, the forum or the finder.

33 See also *O'Connell*, *op. cit.*, p. 914. If the only choice was between the law of the site (certainly where the wreck was on the continental shelf) and that of the finder, it would probably be better to prefer the latter, Allen, *op. cit.*, p. 17.

34 Cf. *O'Connell*, *op. cit.*, pp. 914–8 and see 3.2 below, for a discussion about droits of admiralty as exercised in cases such as *The Thetis* (1835) 3 Hagg Adm 228 and not applied in *The Lusitania* [1986] QB 384.

35 Cf. *The Franconia: R* v *Keyn* (1876) 2 Ex D 53, analysed at length in *O'Connell*, *op. cit.*, p. 93 *et seq.*

36 Cf. *The Tubantia* [1924] P 78, at pp. 86–7 and *O'Connell*, *op. cit.*, pp. 917–8.

37 See 2.2 below.

38 There are examples of such claims by states, e.g. the Government of India Act 1858 s.39, concerning the East India Company, see 2.1.3 below. Cf. private succession arrangements given statutory effect in the Lloyd's Act 1871, 2.3.2 below.

39 See generally, Allen, *op. cit.*; Alexander, *op. cit.*; *O'Connell*, *op. cit.*, p. 918.

40 The equivalent provision in the 1982 Law of the Sea Convention is Art.77.

41 See *O'Connell*, *op. cit.*, p. 918.

42 A. Korthals Altes, 'Submarine Antiquities: A Legal Labyrinth' [1976] 4 Syracuse Jnl of Int Law and Comm 77 at p. 80, argues that wrecks are resources. Cf. A. Strati, 'Deep Seabed Cultural Property and the Common Heritage of Mankind' (1991) 40 ICLQ 859 at 869.

43 For example, Australia, under the Commonwealth Historic Shipwrecks Act 1976, and Ireland, under the National Monuments (Amendment) Act 1987.

44 Report of the International Law Commission to the General Assembly, 11th Session, GAOR Supp No 9, UN Doc A/3159 (1956), reprinted in [1956] 2 Yrbk of Int L Comm 298.

45 D. Owen, 'The Abandoned Shipwreck Act of 1987' (1988) 19 JMLC 499, at p. 503.

46 Art.80 and *O'Connell.*, *op. cit.*, p. 918. *O'Connell* suggests (at p. 918) that states can regulate disturbance of the seabed of the continental shelf where a wreck is embedded in coral and presumably this might extend even to wrecks embedded in sand and sediment, as these could be interpreted as being natural resources of the seabed. Allen, *op cit.*, pp. 21–22, was being rather optimistic in considering that Arts.81 and 85 dealing with drilling and tunnelling, could be used to regulate salvage operations (except in a most minor way).

47 See the Protection of Military Remains Act 1986, 2.1.4 below.

48 Cf. Prott and O'Keefe, *op. cit.*, p. 96.

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49 Article 59 provides for conflicts between state rights in the EEZ to be resolved on the basis of equity.
50 Cf. Prott and O'Keefe, *op. cit.*, p. 100. The latter refer to the Council of Europe's Parliamentary Assembly Recommendation 848 (1978) on the underwater cultural heritage, which recommended that states should claim a 200 mile cultural protection zone: Council of Europe Doc. 4200-E.
51 Art.303 also puts a general duty on states to protect archaeological and historical objects found at sea.
52 See generally, Prott and O'Keefe, *op. cit.*, pp. 97–99.
53 See 2.1 and 2.2 below.
54 In particular, ss.518–534. For the definition of 'wreck' for the purposes of Part IX, see 1.1 above.
55 There are similar systems in other jurisdictions, e.g. in Norway that laid down by the Administration of Wrecks Act 1893: see S. Braekhus, 'Salvage of Wrecks and Wreckage: Legal Issues arising from the Runde Find' [1976] *Scandinavian Studies in Law* 55, at p. 56. In New Zealand, a receiver service was established under the Shipping and Seamen Act 1952. See Davies, *op. cit.*
56 Merchant Shipping Act 1894, s.518.
57 Merchant Shipping Act 1906, s.72.
58 See further, 2.1.1 and 2.1.2 below.
59 See 2.3 below.
60 In practice, material is usually retained by the finder until entitlement to it is established. Since the early 1970s and the rise in consciousness that certain wrecks may be of historical value, it was felt that the finder is more likely than the receiver to have the facilities to carefully preserve historical artefacts.
61 For the Crown's prerogative rights to unclaimed wreck, see 3.1 below. For further details of the statutory provisions, see 3.2 below.
62 Under the Merchant Shipping (Fees) Regulations 1990 (SI 1990 No.555) the fee was 7.5% of the wreck's value. As from April 1991 the fee has been waived: Merchant Shipping (Fees) Regulations 1991 (SI 1991 No.784).
63 In the case of gold and silver coins, the salvor generally receives 75% of net proceeds, the reason for this being that coins are of interest to collectors and therefore have a very good commercial value. For salvage, see 4.1 below.
64 In accordance with the Merchant Shipping Act 1894, s.522.
65 This fact was acknowledged in a Department of Transport Consultative Document published in 1984 which contained proposals for new legislation on wreck. These proposals have never been implemented.
66 The Act protects certain wreck sites in UK territorial waters on account of their historical, archaeological or artistic importance: see further, S. Dromgoole, 'Protection of Historic Wreck: The UK Approach' (1989) 4 IJECL 26–51, 95–1.
67 See 2.2 below.
68 See 2.3 below.
69 *Vereenigde Oostindische Compagnie* (VOC). See 2.1.2 below.
70 She appears to have been ten metres longer than HMS *Victory*: P. Marsden, *The Historic Shipwrecks of South-East England*, (1987), pp. 12–13.
71 Source: file on the wreck belonging to the Archaeology Department, University of Southampton.
72 See 2.1.3 below.
73 Henry VIII's flagship which sank in the Solent in 1545 and was raised in 1982.
74 For details of another similar donation, see 2.1.3 below.

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75 See 4. below.
76 See 3. below.
77 Braekhus, 'Salvage of Wrecks and Wreckage: Legal Issues arising from the Runde Find' *op. cit.*, at p. 53.
78 For example, in September 1992 a wooden ship possibly dating from the Stone Age was found 23 ft below street level during road construction work in Dover: *The Independent*, 17 October 1992. Archaeologists believe that it was left at the edge of a river estuary that once flowed through the area: *The Independent*, 12 October 1992.
79 Established in 1856 as 'The Association for the Protection of Commercial Interests as respects Wrecked and Damaged Property' and incorporated by Royal Charter in 1867. In practice, it operates within Lloyd's and the Institute of London Underwriters, but is available to any person whose interests are affected by perils of the sea.
80 It is evident from the DTp files that attempts have been made to list all potentially valuable cargoes, so there may not be as much 'treasure' to be discovered as is sometimes thought.
81 Another source is the World War I and World War II records of losses recorded in the five volumes of War Loss Books of Lloyd's, see e.g. *Lloyd's War Losses — the Second World War* (1989) Vol. 1.
82 See *The Times*, 19 and 29 April 1986.
83 Wrecked on the beach three miles from Hastings in 1749. The Dutch are planning an ambitious project to take the hull of the *Amsterdam* back to the city of Amsterdam and there display it in a transparent basin as part of a harbour-front development: J Gawronski of the Amsterdam Foundation, in a presentation given to the Department of National Heritage's Advisory Committee on Historic Wreck Sites, at a meeting with its licensees, the Royal Armouries, 25 November 1992.
84 Wrecked off the Outer Skerries in 1711. For further details, see Van Meurs, *op. cit.*, p. 42.
85 The Dutch government took over the assets and liabilities of the Dutch East India Company when it was liquidated in 1798. See Van Meurs, *op. cit.*, pp. 41–42 for details.
86 See 3.2 below.
87 See *The Lusitania* [1986] QB 384, where the question before the court was: who had better title to these unclaimed contents, the salvors or the Crown? See 3.2 below.
88 P. Marsden, *The Wreck of the Amsterdam* (1974).
89 Prior to 1964 it was the Admiralty which administered these rights.
90 For example, in the case of the *Grace Dieu*, see 2.1.1 above.
91 Material recovered must be reported to the Secretary of State for Defence within 12 months and the reporting requirement under the Merchant Shipping Act 1894 must be abided by. A copy of the Deed of Transfer was kindly provided by P. Marsden, Director of the Shipwreck Heritage Centre, Hastings, East Sussex.
92 If someone wants to purchase a cargo, in order to salve it, the Salvage Association is asked to recommend a price: 'For sale, 5,000 desirable wrecks', *The Observer*, 18 September 1988. A senior Executive Officer involved in the sales was reported as saying: 'If someone wants a wreck to dive off, we ask them to suggest their own price and hope they will be embarrassed into offering something substantial.'
93 Other examples of East Indiamen include the *Earl of Abergavenny* sunk off Weymouth in 1805; the *Admiral Gardner*, sunk in the Goodwin Sands in 1809; and the *Hindostan*, which sank off Margate in 1803.

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94 See *US* v *Steinmetz* [1991] AMC 2099 at p. 2106. '*Kearsage* was in constructive possession of *Alabama*, positioned across *Alabama's* bow thwarting escape and able to deliver unanswerable raking fire', according to Debevoise D.J., at p. 2106.
95 *US* v *Steinmetz* [1991] AMC 2099 at p. 2106. See further, 2.2 below.
96 Although, at the time of sinking, the vessel was on the high seas since the French only established a 12 mile territorial limit in 1971: Law No.71 – 1060 (Dec.24, 1971). See J. Ashley Roach, 'France Concedes United States Has Title to CSS *Alabama*' (1991) 85 AJIL 381.
97 In the same year an agreement was signed by the two governments relating to the protection and study of the wreck and its artefacts. For further details, see J. Ashley Roach, *op. cit.*
98 Earlier salvage operations on the forward and midship sections led to the recovery of various items but the gold was never found and therefore thought to be in the stern section.
99 Giving rise to the tradition 'Women and children first', known as the 'Birkenhead drill': *The Times*, 14 March 1986.
100 Under the War Graves and National Monuments Act 1969 (South Africa), as amended. The permit required the salvors to take proper account of the archaeological, historical and cultural aspects of the wreck. The salvors were entitled to half of the material as salvage and were required to give the other half to the Monuments Council which would give most of it to the South African Cultural History Museum and a selection to the relevant regiments (apparently at the request of the salvors). For details of recent measures to improve the permit system, see B. Werz, 'A preliminary step to protect South Africa's undersea heritage' (1990) 19 IJNA 4.
101 HMS *Birkenhead*: Exchange of Notes, Cm 906, Treaty Series No.3 (1990).
102 Agreement Between the Netherlands and Australia Concerning Old Dutch Shipwrecks, 1972 Aust. TS No 18; appended as Schedule 1 to the Commonwealth of Australia's Historic Shipwrecks Act 1976. For further details, see Prott and O'Keefe, *op. cit.*, pp. 287 – 291, 319. As Prott and O'Keefe point out (p. 319), the Agreement does not state that the Netherlands did have title to the vessels and therefore does not constitute an acknowledgement of their claim by Australia.
103 Between 1857 and 1861 bullion valued at about £40,000 was recovered. For further details, see 2.3.2 below.
104 In Streedagh Bay, Co. Sligo: *The Irish Times*, 22 May 1985.
105 See the *Treasure Salvors*, *Cobb Coin* and *Platoro* cases, 4.6 below. See also, A. Korthals Altes, 'Sunken Spanish Treasures in Anglo-American Law', in M.J. Palaez, *Derecho Comercial Comparado Trabajos en homenaje a Ferran Valls, Taberner*, Vol. XI (1989) pp. 3137 – 3145.
106 Estatuto nr. 60/62, 24 December 1962.
107 International Law Association Queensland Conference, Committee on Cultural Heritáge Law, First Report (1990), p. 4.
108 *Ibid.*
109 See J. Gronhagen, 'Marine Archaeology in Finnish Waters' in P. Forsythe (ed.), *Proceedings of the Sixteenth Conference on Underwater Archaeology* (1985).
110 Prott and O'Keefe, *op. cit.*, p. 192.
111 As to the meaning of 'abandoned shipwreck' for the purposes of this Act, see 2.2 below.
112 See further, Prott and O'Keefe, *op. cit.*, pp. 192 – 3 and Vol. 3, p. 440 *et seq.* A potential conflict of this nature was the reason for the Agreement

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Between Australia and The Netherlands Concerning Old Dutch Shipwrecks, see further, 2.1.3 above.

113 C. Martin, Institute of Maritime Studies, St. Andrews, in a presentation to the Department of National Heritage's Advisory Committee on Historic Wreck Sites, at a meeting with its licensees, Royal Armouries, 25 November 1992. The vessel is believed to have been part of a royalist invasion fleet during the English Civil War: *The Independent*, 17 August 1992. The site was designated under the Protection of Wrecks Act 1973 in May 1992.

114 As amended by the Environment Protection Act 1990 s.146. Apparently permission is granted only on condition that bodies are labelled.

115 *Halsbury's Laws of England* (4th edn.), Vol.10 para. 1019. For detailed discussions, see P. Skegg, 'Human Corpses, Medical Specimens and the Law of Property' (1975) 4 Anglo-American LR 412, P. Matthews, 'Whose Body? People as Property' [1983] CLP 193.

116 Skegg, and Matthews, *op. cit.*

117 See *Elwes* v *Brigg Gas Company* (1888) 33 Ch D 562.

118 See 4.6 below.

119 The law of salvage does not apply to live humans and there is no reason to extend it to bodies, e.g. so as to recognise possessory rights of the salvor: see 4.3 below. The removal of bodies for scientific research may be covered by the Human Tissue Act 1961.

120 Although success in the damages claim seems unlikely, given the present state of the authorities: cf. *Alcock* v *Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907.

121 See Matthews, *op. cit.*, p. 218.

122 See, e.g. B. Penrose, *Stalin's Gold* (1982), p. 86, stating that HMS *Edinburgh* had been designated an official war grave in 1957 and M. Middlebrook, P. Mahoney, *Battleship* (1977), p. 326, referring to the *Prince of Wales* and the *Repulse*.

123 See 4.3 below.

124 Middlebrook and Mahoney, *op. cit.*, p. 326.

125 *The Sunday Times*, 18 October 1981.

126 No designation orders have yet been made.

127 Although the Act also applies to restrict operations on foreign military vessels in UK waters: see. s.1(3).

128 In 1985 and 1986, Bills were introduced in the US Congress attempting to designate the *Titanic* as a maritime memorial.

129 The distinction in salvage law between a vessel which is derelict, and a vessel which is not, is explained at 4.3 below.

130 See, for example, *The Aquila* (1798) I C Rob 36, 165 ER 87 per Sir W. Scott at pp. 88,89; *HMS Thetis* (1835) 3 Hagg Adm 229, 166 ER 390 per Sir John Nicholl at 393; *Cossman* v *West* (1887) 13 App Cas 160 at pp. 180,181; *Bradley* v *Newsom* [1919] AC 16 (HL) per Lord Finlay L. C. at pp. 27,28.

131 This has not always been the case: see 3.1 below.

132 In civil law systems the term 'dereliction' is used to denote abandonment or relinquishment of the right of ownership: see Braekhus, 'Salvage of Wrecks and Wreckage', *op. cit.*, p. 47. See also *The Lusitania* [1986] QB 384 per Sheen J. at pp. 388–9 where it seems that the learned judge may have conflated the two meanings of the notion of derelict.

133 See, in particular, Braekhus, 'Salvage of Wrecks and Wreckage', *op. cit.*, for an excellent discussion on this point. See also, e.g. *The Tubantia* [1924]

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P 78, at p. 87 on intention, where Sir Henry Duke P. referred to the Roman law origins of the principle.

134 See R. Lanier, 'Abandon Ship? The Utility of Abandonment' (1977–78) 9 JMLC 131, and K. Roberts, 'Sinking, Salvage and Abandonment' (1977) 51 Tul L Rev 1196, 1199. See also the sources cited in N. Palmer, *Bailment* (2nd edn., 1991).

135 R. Goode, *Commercial Law* (1982), p. 58 (f.n. 41).

136 See R. Grime, 'Abandonment: Some Theoretical Problems', in *Problems of the Shatt al Arab* (Institute of Maritime Law, Faculty of Law, University of Southampton, 1983) pp. 33–34. A. Bell, *Modern Law of Personal Property in England and Ireland* (1989), mentions abandonment in passing only (at pp. 40, 68) but seems to assume it is possible.

137 See *Elwes* v *Brigg Gas Co.* (1886) 33 Ch D 562, per Chitty J. at 568–9.

138 *Robinson* v *Western Australian Museum* (1977) 51 ALJR 806, per Stephen J. at pp. 820–21.

139 Braekhus, 'Salvage of Wrecks and Wreckage', *op. cit.*, pp. 51–52 has suggested that this view is supported by the doctrine of laches. Cf. Grime, *op. cit.*, Palmer, *op. cit.*, pp. 1431–1432, f.n. 64. Palmer asserts that no lapse of time, however great, will by itself extinguish title, but later seems to accept that express abandonment may be possible in the case of wrecks, leaving open the issue of abandonment implied through lapse of time.

140 [1924] P 78, at p. 87.

141 See e.g. the decision in *The Egypt* (1932) 44 Ll L Rep 21. *The Lutine*, 2.3 below, is an example where Lloyd's underwriters were maintaining a claim some 60 years after a ship was lost. US and UK insurers have also asserted a claim to the gold on board the SS *Central America* which sank in 1857, see 4.6 below for details.

142 [1986] 1 QB 384.

143 *Ibid.*, p. 389 (emphasis added).

144 See R. Olsen, 'The salvor's rights and duties in relation to property recovered', in *Proceedings of the International Marine Salvage Conference*, London (1988), p. 6. A court must, presumably, decide on the evidence before it.

145 [1975] 2 Lloyd's Rep 338.

146 There was also a difficult question as to whether East or West Germany was the lawful successor in title. Such problems will increase with the break up of Eastern European states such as Yugoslavia and the Soviet Union.

147 (1977) 51 ALJR 806, at pp. 820–821.

148 Jacobs J. (p. 829) agreed. Cf. I. Shearer (ed.), *O'Connell*, *op. cit.*, p. 318.

149 N. Rt. 346 (1970 N.D. 107). See Braekhus, 'Salvage of Wrecks and Wreckage', *op. cit.*, p. 54.

150 J. Ashley Roach, *op. cit.*, p. 381, citing the *1980 Digest of United States Practice in International Law* 999–1066, and US Navy, *The Commander's Handbook on the Law of Naval Operations*, para.2.1.2.2. (NWP9 (Rev A)/ FMFM 1–10, 1989).

151 [1991] AMC 2099. On 24 August 1992, the US Court of Appeals for the 3rd Judicial Circuit rendered an opinion in favour of the US but apparently avoided several of the important issues which had been argued on behalf of Steinmetz. Therefore, in September 1992 Steinmetz filed a Petition for Rehearing.

152 See *O'Connell*, *op. cit.*, p. 912. US courts have nevertheless been prepared to apply the abandonment theory to states, see *Platoro Ltd Inc* v *The Unidentified Remains of a Vessel* (1981) 518 F Supp 816, 4.6 below.

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153 Cf. the various time limits set out in the Protection of Military Remains Act 1986.
154 U.S. Department of the Interior, National Park Service, *Abandoned Shipwreck Act Guidelines* (1989).
155 *Ibid.*
156 Marine Insurance Act 1906 s.79(1).
157 *Ibid.* In the case of an actual total loss there is no need for a notice of abandonment (s.62(7)), but in practice a shipowner wishing to claim for a total loss will give notice, leaving it to be later determined whether the loss was actual or constructive. See M. Mustill, J. Gilman (eds.), *Arnould's Law of Marine Insurance and Average* (16th edn., 1981), Chap. 30.
158 Marine Insurance Act 1906, s.61.
159 Marine Insurance Act 1906, s.57(2).
160 Marine Insurance Act 1906, s.63(1).
161 Per Langton J. (obiter) in *The Egypt* (1932) 44 Ll L Rep 21, at p. 39.
162 Marine Insurance Act 1906, s.62(5).
163 See *Arnould, op. cit.*, p. 1061.
164 See *Arnould, op. cit.*, pp. 1060–1061 on the relevance of the 'waiver clause', whereby the insurer is said not to waive or accept abandonment by acts of recovering property.
165 (1923) 28 Com Cas 367.
166 This is the view apparently supported by *Arnould, op. cit.*, p. 1070.
167 *Pesquerias y Secaderos de Bacalao de España SA* v *Beer* [1946] 79 Ll L R 417.
168 This view appears to be supported by Greer J. in *Oceanic Co* v *Evans* (1934) 40 Com Cas 108 at p. 111 and Cohen L.J. in *Blane SS Co* v *Minister of Transport* [1951] 2 KB 965 at pp. 990–1. See also R. Lambeth, Templeman on Marine Insurance (6th edn., 1986), pp. 452–3.
169 Cf. *The Crystal* [1894] AC 504.
170 See *Ocean St Nav Co Ltd* v *Evans* (1934) 40 Com Cas 108, at p. 111.
171 *Columbus America Discovery Group* v *The Unidentified, Wrecked and Abandoned Sailing Vessel* [1990] AMC 2409 (reversed on appeal, (1992) 337 LMLN 1).
172 p. 2440. On appeal, it seems to have been accepted that the court below had prima facie recognised the rights of the insurers, and the main issue was whether these rights had then been abandoned. See further, 4.6 below.
173 See R. Flowers, M. Wynn Jones, *Lloyd's of London: An Illustrated History* (1974), pp. 114–118; H. Lay, *A Textbook of the History of Marine Insurance* (1925), p. 58.
174 *Ibid.*
175 It would also seem that the provision was not designed to enable the proceeds to be spread amongst existing members, but to further more general, if not charitable, aims.
176 In 1875 there were 710 members and in 1924 only 1243 underwriting members, see Lay, *op. cit.*, p. 57. Today, there are almost 30,000 members grouped into about 370 syndicates (source: Lloyd's).
177 10/91, shortly to be replaced.
178 At the time, the White Star Line was a British company (as required under the Merchant Shipping Act 1894), although its shareholding had been acquired in 1902 by the American corporation, International Mercantile Marine: Allen, *op. cit.*, p. 15.
179 M. Nash, 'The Lusitania and Its Consequences', NLJ, 4 April 1986.

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180 In an article in *The Times* on 14 December 1985, Marcel Berlins stated that the underwriters, in paying out the insurance claim, became owners of the wreck. With respect, it seems that he was wrong in saying this because the underwriters do not become the owner automatically, they have a choice.
181 White Star, original owners of the *Titanic*, merged with the Cunard Steamship Company in 1934 and Cunard later became part of Trafalgar House. The French government have recently offered for sale relics from the *Titanic*, giving descendants of the passengers first choice: '*Titanic* sale attacked as grave robbing', *The Times*, 18 December 1992.
182 *The Lusitania* [1986] QB 384.
183 Per Sheen J. at p. 386.
184 It appears that the government was a reinsurer from the Liverpool and London War Risks Association for some 80%. In 1962, the government apparently sold its title to the wreck to 'a businessman': *The Times*, 14 November 1985.
185 Arnould, *op. cit.*, pp. 1071–1072, cites with apparent approval the US decision of *White Star SS Co* v *North British and Mercantile Ins Co Ltd* [1943] AMC 399, where an insurer appeared to have made such an election by declining to pay for wreck removal. In those circumstances, it was not entitled to proceeds from the wreck.
186 A typical example would be *The Coxwold* [1942] AC 691, where a vessel stranded because of tidal conditions, while carrying war stores. She was closer than normal to land, where warning lights were dimmed.
187 See generally J. Butler, R. Merkin, *Reinsurance Law* (1992), Section C.3.1.
188 Dig. XLI, I, 58; 2,21,1, as quoted in F. Sanborn, *Origins of the Early English Maritime and Commercial Law* (1930, reprinted 1989).
189 Cod. XI, 6, I, as cited in Sanborn, *op. cit.*, p. 16.
190 Dig. XLVII, 9, 3 pr., as cited in Sanborn, *op. cit.*, p. 16.
191 Such rights were known as 'foreshore rights' or 'wreckers' rights'. See Braekhus, 'Salvage of Wrecks and Wreckage', *op. cit.*, p. 43. See also K. Goddard, 'Is there a right to wreck?' [1983] LMCLQ 625. In the US the term 'wreckers' is applied to legitimate and illegitimate salvors of wreck: see Benedict, *op. cit.*, s. 133.
192 As Sanborn calls it, *op. cit.*, p. 115.
193 *Ibid.*
194 See 1.1 above.
195 [1836] 3 Hagg Adm 257.
196 According to Sanborn, *op. cit.*, p. 315.
197 *Halsbury's Laws* (4th edn.), Vol. 8, para. 1506, f.n. 1.
198 3 Edw. I, c.4.
199 Cited in Braekhus, 'Salvage of Wrecks and Wreckage', *op. cit.*, at p. 44. This rule was originally laid down by Henry III in 1236, but the Statute of Westminster extended the time for claiming the shipwrecked goods to a year and a day (rather than the original three months). See Sanborn, *op. cit.*, p. 316; T. Twiss (ed), *The Black Book of the Admiralty*, Vol. 1 (reprinted 1985) p. 85. In fact, according to S. Moore, *History of the Foreshore* (3rd edn., 1888) p. 68, by the reign of Edward I the franchise of wreck had been granted out by the Crown over the greater part of the coasts of the Kingdom and there was little left for the Crown. See futher, 3.1.2 below.
200 Braekhus, 'Salvage of Wrecks and Wreckage', *op. cit.*, p. 44.
201 Hale, *De Jure Maris*, as cited in Moore, *op. cit.*, p. 408. The whole of Hale's *De Jure Maris*, as edited by Hargrave, is cited in Moore, *op. cit.*, pp. 370–413.

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202 As cited in Moore, *op. cit.*, p. 408. See also R. Marsden, *op. cit.*, at p. 355.
203 This is confirmed by R. Marsden, who states (*op. cit.*, p. 361) that – in respect of droits – not much regard seems to have been paid to the claims of the owners of such property.
204 *Hamilton* v *Davis* 5 Burr 2732, 98 ER 433.
205 See e.g. 6 & 7 Will. IV, c.60, s.7 (1836) and 8 & 9 Vict. c.86, s.54 (1845). See also Kennedy, *op. cit.*, p. 41 and *The Aquila* (1798) I C Rob 36, 165 ER at 89.
206 See Twiss, *op. cit.* See also Sanborn, *op. cit.*, p. 117. Now see the Merchant Shipping Act 1894 s.521.
207 'Likewise the admiral shall have and take by virtue of his office one moiety of every manner of flotsam found on the sea, whether it be casks of wine, bundles of cloth, sacks of wool, or any other thing, and the takers and seisors of the same the other moiety.' 'Likewise the admiral shall have and take by virtue of his office, one moiety of every manner of lagan, dragged or raised from the bottom of the sea, whether it be anchors, tables, chests, or any other thing, and the gainers of the same the other moiety'. Twiss, *op. cit.*, p. 397.
208 R. Marsden, *op. cit.*, p. 359.
209 Cf. 4.6 below.
210 For details, see 1.3 above.
211 A distinction was drawn between the grant of rights to *wreccum maris* and the grant of rights to *adventurae maris*: see Moore, *op. cit.*, pp. 467–469 and *R* v *Forty-nine Casks of Brandy* (1836) 3 Hagg Adm 257, which concerned the grant by Queen Elizabeth I of Corfe Castle in Dorset, including '...wrecks of the sea, shipwrecks,...' to Sir Christopher Hatton, K.G., Lord Chancellor of England. See also *Dunwich* v *Sterry* (1831) 109 ER 995; *Halsbury's Laws*, (th edn.), Vol. 8, paras. 1506–1509.
212 P. Marsden, *The Wreck of the Amsterdam*, *op. cit.*
213 See 1.3 above.
214 [1986] QB 384.
215 Currently set by the Territorial Sea Act 1987. Section 1(1)(a) provides for a territorial sea of 12 nautical miles in breadth.
216 *De Jure Maris*, as cited in Moore, *op. cit.*, p. 410. See R. Marsden, *op. cit.*, p. 353.
217 R. Marsden, *op. cit.*, p. 359.
218 R Marsden, *op. cit.*, p. 364.
219 M. Nash, '*The Lusitania* and Its Consequences' NLJ, 4 April 1986; see also J. Gibson, '*The Lusitania* and Ownership of Wreck' (1986) 1 IJECL 323.
220 (1835) 1 Hagg Adm 383, 166 ER 136.
221 See also *The Thetis* (1835) 3 Hagg Adm 228, where the ship was sunk off Brazil.
222 [1986] QB 384, at p. 395.
223 [1986] QB 384, at pp. 392–3. Cf. the *Treasure Salvors* case [1978] AMC 1404, at pp. 1418 *et seq.*, which assumed that the Crown did have such rights, see 4.6 below.
224 For example, it appears that in the Netherlands, a bona fide purchaser from a salvor will acquire good title three years after the loss.
225 See F. Rose, 'Restitution for the Rescuer' (1989) 9 OJLS 167.
226 See *Falcke* v *Scottish Imperial Insurance Co* (1886) 34 Ch D 234, at p. 248.
227 *The Two Friends* (1799) 1 C Rob 271, at p. 277; 165 ER 174.
228 See 4.2 below, on the question of whether all wreck is considered as maritime property.

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229 For further reference on the elements of a salvage service, see D. Steel, F. Rose, *Kennedy's Law of Salvage* (5th edn., 1985); G. Brice, *Maritime Law of Salvage* (1983); N. Gaskell, C. Debattista, R. Swatton, *Chorley and Giles Shipping Law* (8th edn., 1987), Chap. 24.
230 That is not to deny the possibility of a contract for salvage: see further 4.4 below.
231 In *The Five Steel Barges* (1890) 15 PD 142, 146, Sir James Hannen P. managed to refer both to the 'equitable character' of the jurisdiction while stating that the right to salvage was a 'legal liability'. Although sometimes described as equitable, salvage rights are historically unconnected with those derived from the Court of Chancery and the central tenets are not derived from those applied by the common law courts: see generally Kennedy, *op. cit.*, Chap. 2.
232 The 1910 Salvage Convention and the 1989 Salvage Convention, see 4.5 below.
233 See further, D. Jackson, *Enforcement of Maritime Claims* (1985), especially Chap. 12; R. Thomas, *Maritime Liens* (1980), especially Chaps. 1 and 5; W. Tetley, *Maritime Liens and Claims* (1985), especially Chaps. 1 and 8.
234 The Civil Aviation Act 1982, s.87(1) extends the jurisdiction to aircraft which are wrecked in the sea. With the exception of aircraft, salvage rights do not extend to types of property found at sea which cannot easily be fitted into the definition of 'ship' in the Merchant Shipping Act 1894, s.742. Therefore, they do not apply to archaeological remains which do not derive from the wreck of a ship or aircraft.
235 See the Supreme Court Act 1981, s.20(1)(j), 21(3).
236 *The Bold Buccleugh: Harmer* v *Bell* (1850) 7 Moo PCC 267.
237 See Jackson, *op. cit.*, pp. 221–3; Tetley, *op. cit.*, p. 541 *et seq.*, H. Staniland, Comments, in [1989] LMCLQ 174, [1990] LMCLQ 491.
238 *The Halcyon Isle* [1981] AC 221. See also *The Russland* [1924] P 55.
239 Certain 'public' claims, such as the expenses of the court official responsible for arrest, may be afforded the first priority in most systems.
240 See *The Gustaf* (1862) Lush 506, at p. 508, 167 ER 230, at p. 231; *The Lyrma (No.2)* [1978] 2 Lloyd's Rep. 30, at p. 33.
241 Maritime Conventions Act 1911, s.8.
242 See generally, *Kennedy*, *op. cit.*, p. 518 *et seq.*, Brice, *op. cit.*, p. 92 *et seq.*, pp. 114–118.
243 (1887) 13 App Cas 160, at p. 181.
244 See 2.2 above.
245 *Cossman* v *West* (1887) 13 App Cas 160, per Sir Barnes Peacock, at p. 181, even if the master and crew have left the vessel temporarily for the purpose of obtaining assistance: *The Aquila* (1798) I C Rob 36, 165 ER 87, per Sir William Scott, at p. 88.
246 *Cossman* v *West* (1887) 13 App Cas 160 at p. 181.
247 S. Braekhus, 'Competing Salvors' [1967] *Scandinavian Studies in Law* 65 at p. 80.
248 *Ibid.* Note that interference with divers authorised to work on a site designated under the UK Protection of Wrecks Act 1973 is an offence: s.1(6).
249 (1887) 13 App Cas 160, at p. 181.
250 The authorities are inconclusive: see *Kennedy*, *op. cit.*, p. 520.
251 Braekhus, 'Competing Salvors', *op. cit.*
252 Although similar results were achieved in *The Fleece* (1850) 3 W Rob 278, 166 ER 966.

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253 The salvor does not need a possessory lien where there is a maritime lien, as the latter is inchoate and travels with the ship. (The security is only undermined if the vessel travels to a state where the maritime lien cannot be enforced).
254 The mechanism exists in salvage law to compensate superseded salvors: see e.g. *The Hassel* [1959] 2 Lloyd's Rep 82.
255 See *The Tubantia* [1924] P 78, at p. 86.
256 *The Association and The Romney* [1970] 2 Lloyd's Rep 59, per Dunn J., at p. 61.
257 [1924] P 78.
258 50 miles from Britain and 20–27 miles from France, Belgium and Holland.
259 [1924] P 78, at p. 89.
260 *The Tubantia* [1924] P 78, per Sir Henry Duke at p. 90.
261 The UK Protection of Wrecks Act 1973 only prevents competition between 'salvors' on a small number of designated sites in UK territorial waters.
262 [1970] 2 Lloyd's Rep 59.
263 Although decided before *American Cyanimid* v *Ethicon* [1975] AC 396, it does not appear that the result would have differed.
264 Some of the treasure recovered from the *Association* and the *Romney* was donated to the Penzance Maritime Museum. However, the episode caused outrage among archaeologists and led almost directly to enactment of the Protection of Wrecks Act 1973.
265 *Columbus America Discovery Group* v *The Unidentified, Wrecked and Abandoned Sailing Vessel* [1989] AMC 1955 (reversed on other grounds, (1992) 337 LMLN 1) and see M. King, 'Admiralty Law: Evolving Legal Treatment of Property Claims to Shipwrecks in International Waters' (1990) 31 Harv Int L J 313.
266 [1989] AMC 1955, at p. 1958.
267 *Ibid.* Moreover, it is necessary to distinguish between possession of the wreck site, the wreck itself and artefacts within it: cf. *Robinson* v *Western Australian Museum* (1977) 51 ALJR 806, at p. 821.
268 Of particular relevance to ancient wrecks, possession may be difficult to prove where wreckage is scattered for some distance over the seabed.
269 See *Kennedy*, *op. cit.*, p. 297 *et seq.*, *Chorley and Giles*, *op. cit.*, pp. 453–454.
270 The Lloyd's Standard Form of Salvage Agreement 1990 – known as the Lloyd's Open Form (LOF) – is the most common form used internationally for salvages by professional salvors. See further, N. Gaskell, 'Contractual Remedies and the LOF' [1986] LMCLQ 306.
271 Cf. cases such as *The Texaco Southampton* [1983] 1 Lloyd's Rep 94.
272 See *Kennedy*, *op. cit.*, p. 266 and *Castellain* v *Thompson* (1862) 13 CB (NS) 105, 143 ER 41.
273 See e.g. *The Solway Prince* [1869] P 120 where the contract was with the insurers and the contractor was unable to sue the owners in *rem.*
274 It was reported that the spectacular finds from the Dutch East Indiaman *Geldermalsen* were to be split 10% to the Dutch government and 90% to the salvors: *The Times*, 29 April 1986. With other ships, such as the *de Leifde*, the Dutch government accepted 25% of the gross, see Van Meurs, *op. cit.*, p. 42.
275 Penrose, *op. cit.*, p. 218.
276 Cf. *The Association and The Romney* [1970] 2 Lloyd's Rep 59 and see 4.3 above.
277 See generally on this issue, F. Berlingieri, 'The Draft of a New Salvage Convention and the Salvage of Wrecks', reproduced as an Annex to the IMO Legal Committee document LEG/58/inf.2, 5 August 1987.

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278 See 2.2 and 3., above.
279 Berlingieri, *op. cit.*, citing C. Abbott (Lord Tenterden), *A Treatise of the Law Relative to Merchant Ships and Seamen*, in a passage from the fifth edition (the last for which Abbott was responsible) which was restated in later editions. Abbott based himself upon *The Aquila* (1798) 1 W Rob 36.
280 See e.g. *The Cadiz and the Boyne* (1876) 3 Asp MLC 332, *The Egypt* (1932) 44 Ll L Rep 21. But cf. *Simon* v *Taylor* [1975] 2 Lloyd's Rep 338.
281 Berlingieri, *op. cit.*
282 *Ibid.*
283 See N. Gaskell, 'The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990' 16 Tul Mar LJ 1, 34–37.
284 *Ibid.*
285 See *Kennedy, op. cit.*, p. 60, citing *Castellain* v *Thompson* (1862) 13 CB (NS) 105, 143 ER 41.
286 See Art. 30(1)(d) of the 1989 Salvage Convention and cf. *O'Connell, op. cit.*, p. 908, f.n. 283.
287 See e.g. *The Rilland* [1979] Lloyd's Rep 455 and Art. 13(1) of the 1989 Salvage Convention.
288 See e.g. the scheme of the Merchant Shipping Act 1894, s.521, 1.3 above.
289 See below.
290 See generally, Palmer, *op. cit.*, Chap. 23.
291 [1982] QB 1004. See also *Elwes* v *Brigg Gas Co* (1886) 13 Ch D 562, which concerned a prehistoric boat embedded in the land, rather than at sea. See also Van Meurs, *op. cit.*, pp. 40–41, regarding 'wreck formations'.
292 [1986] QB 384, see 3.2 above.
293 See further, *Benedict on Admiralty* (1991), sec.158; D. Owen, 'Some legal troubles with treasure' *op. cit.*; D. Owen, 'The Abandoned Shipwreck Act of 1987' *op.cit.*; Alexander, *op. cit.*; King, *op. cit.*
294 [1978] AMC 1404 (*Salvors I*), [1981] AMC 1857 (*Salvors III*).
295 [1990] AMC 2409 (reversed on appeal, (1992) 337 LMLN 1).
296 In *Benedict, op. cit.*
297 See *Benedict, op. cit.* In the latest edition at s.158, Norris would limit the law of finds to long lost wrecks such as the *Nuestra Señora de Atocha* or where the owners of maritime properties have publicly abandoned them.
298 See e.g. *Salvors I* [1978] AMC 1404, 1411–1412. Also *MDM Salvage Inc* v *The Unidentified, Wrecked and Abandoned Sailing Vessel* [1987] AMC 537, *Klein* v *The Unidentified, Wrecked and Abandoned Sailing Vessel* [1985] AMC 2970, *Platoro Ltd Inc* v *The Unidentified Remains of a Vessel* (1981) 518 F Supp 816, *Indian River Recovery Co* v *The China* [1989] AMC 50, *Rickard* v *Pringle* [1968] AMC 1008, *Wiggins* v *1100 Tons, More or Less of Italian Marble* [1960] AMC 1774, *Nippon Shosen Kaisha, KIK* v *US* [1964] AMC 2032, *Chance* v *Certain Artefacts Found and Salvaged from the Nashville a/k/a The Rattlesnake* [1985] AMC 409.
299 [1981] AMC 1857, at p. 1865.
300 [1990] AMC 2409, at p. 2421. On appeal, the majority of the court did not expressly disagree with such a formulation, but adopted a much more restrictive application of it.
301 Cf. the reluctance of the High Court to grant a declaration in *The Association and The Romney*, above.
302 Cf. *The Lusitania* [1984] QB 284, see 3.2 above.
303 See 2.2 above.
304 Norris felt obliged to concede that this was the only sort of case where abandonment was possible.

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305 [1990] AMC 2409 (reversed on appeal, (1992) 337 LMLN 1).
306 On appeal, a new trial was ordered on this part of the case as the trial judge had denied discovery.
307 See 2.3 above.
308 To this extent, the assumption made by the majority that Kellam D.J. had found a prima facie case of ownership is questionable.
309 Many documents were destroyed in wartime and insurance records from very early cases were also burned in a fire at the Royal Exchange in 1838: see Lay, *op. cit.* In any organisation changes in personnel can result in old documents being accidentally discarded.
310 Underwriters do not consider themselves in the business of fitting out expensive and speculative salvage operations and are happy to rely on the entrepreneurialism of salvors.
311 Most insurance companies would have management minute books or loss books, recording simply that ship X sank and £Y were paid out. It may be rare for companies to keep original documents from before World War I.
312 See discussion at 2.3 above.
313 *Salvors III* [1981] AMC 1857, at p. 1874.
314 See Alexander, *op. cit.*, pp. 17–19.
315 See *Benedict*, *op. cit.*, s.158; Owen, 'The Abandoned Shipwreck Act of 1987' *op. cit.* When the Act came into force the 'submerged lands' accorded, for the most part, with the then existing three mile territorial limit. Even though the US extended its territorial limit to 12 miles in 1988, this extension did not extend or alter existing federal laws: A. Giesecke, 'Shipwrecks: The Past in the Present' [1987] *Coastal Management* 179 at p. 183.
316 I.e. those not embedded and not included in the National Register: see Abandoned Shipwreck Act of 1987 Sec.6.
317 See the 1982 Law of the Sea Convention, Art.149, 1.2 above.
318 See e.g., the 1989 Salvage Convention Art.30(1)(d), the 1982 Law of the Sea Convention Art.149, 1.2 above.
319 See Dromgoole, *op. cit.*, N. Gaskell 'The Enactment of the 1989 Salvage Convention in English Law: Policy Issues' [1990] LMCLQ 352, 357–8.
320 See 3.2 above.
321 Cf. the US Abandoned Shipwreck Act of 1987.
322 See Dromgoole, *op. cit.*, p. 50.
323 There will be difficulties in deciding whether some vessels are of historical or cultural value. Changes in attitudes towards such concepts will inevitably occur and some comparatively modern vessels may soon be regarded as having historical significance. Accordingly, it may be increasingly difficult to declare that wrecks have only commercial value.
324 Arising because of the nationality of the original owner, the place of registration (or nationality of) the vessel, the location of the wreck (whether in territorial waters of, on the continental shelf of, or in close proximity to, a state).
325 Cf. the 1982 Law of the Sea Convention Art.149, see 1.2 above.
326 Dromgoole, *op. cit.*, pp. 106, 102–109.
327 The interests of such amateurs should not be ignored. Indeed, an increasing awareness of the richness of the seabed can only encourage nautical archaeology.
328 Presumptions, or a best evidence provision, could apply where the exact date is unknown. The Council of Europe's Recommendation 848 (1978) for a scheme of protection of the underwater cultural heritage of Europe recommended that all items that had been beneath the water for more than

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100 years should be covered by protective legislation: see Council of Europe Doc.4200-E.

329 Environmental and wreck-raising issues should be dealt with too: see further S. Dromgoole, N. Gaskell, 'Interests in Wreck', in N. Palmer (ed.), *Interests in Goods*, (in press).

330 The proper body to co-ordinate the production of such a convention should be the UN, but there could be political difficulties involving inter-organisation rivalry between the International Maritime Organisation (IMO), the UN Educational Science and Cultural Organisation (UNESCO), and the UN Conference on Trade and Development (UNCTAD). Further, all the 'common heritage of mankind' issues might resurface which so bedevilled the production of the 1982 Law of the Sea Convention. It would have been better if commercial wrecks had been clearly left out of the common heritage equation, without prejudice to the fate of any minerals found on the seabed.

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